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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN SEXTON,

Petitioner,

v.

MIKE KEMNA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
PATRICK J. BERRIGAN
WATSON & DAMERON
2500 Holmes Road
Kansas City, MO 64108
(816) 474-3350

GREGORY A. CASTANIAS
(*Counsel of Record*)
ELIZABETH REES
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

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QUESTION PRESENTED

Petitioner was initially convicted of one count of rape and five counts of sodomy. The trial judge sentenced him to twenty years in prison for the rape charge and five concurrent *twenty-year* sentences on each of the five sodomy counts, to be served consecutively with the twenty-year sentence on the rape count. After petitioner's convictions were reversed on appeal, he was retried, again convicted on the sodomy counts, but this time acquitted of the rape charge. The judge sentenced him to five concurrent *forty-year* sentences on the sodomy counts.

A divided Eighth Circuit panel, expressly recognizing a conflict among the circuits and state courts, affirmed the denial of petitioner's habeas corpus petition. It held that the trial judge's doubled sentence on the sodomy counts was not "more severe" so as to trigger the presumption of judicial vindictiveness under *North Carolina v. Pearce*, 395 U.S. 711 (1969), because petitioner's "aggregate" sentence was not greater after the second sentencing, even though he had been acquitted of the rape charge that resulted in twenty years of his original sentence. In so ruling, the Eighth Circuit disagreed with decisions of the Second, Fourth, and Eleventh Circuits, and the Supreme Courts of Connecticut, Illinois, and Pennsylvania, all of which determine whether a second sentence is "more severe" by comparing the original sentences to the subsequent sentences on the valid remaining counts.

The question presented is:

Whether a trial judge's decision to double a defendant's sentence, after a successful appeal, from that previously imposed by the same judge on the same counts, is a "more severe" sentence that triggers the presumption of vindictiveness under *North Carolina v. Pearce*, even though the total sentence imposed after the second set of convictions is the same as the total sentence imposed after the now-reversed first set of convictions.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were John Sexton, as Petitioner-Appellant, and Mike Kemna, as Respondent-Appellee.

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PETITION FOR A WRIT OF CERTIORARI

John Sexton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 278 F.3d 808, and is reprinted at pages 1a-17a of the appendix to this petition. The opinion of the United States Court of Appeals for the Eighth Circuit denying petitioner's petition for rehearing *en banc* is not officially reported, but is reprinted at page 75a of the appendix to this petition. The opinion of the United States District Court for the Western District of Missouri denying petitioner's application for a federal writ of habeas corpus is not officially reported, but is reprinted at pages 22a-52a of the appendix to this petition. The order of the United States District Court for the Western District of Missouri granting in part and denying in part petitioner's certificate of appealability is not officially reported, but is reprinted at pages 18a-22a of the appendix to this petition.

The opinion of the Court of Appeals of the Western District of Missouri reversing petitioner's initial convictions and sentences and remanding for a new trial is reported at 890 S.W.2d 389, and is reprinted at pages 69a-74a of the appendix to this petition. The opinion of the Court of Appeals of the Western District of Missouri on petitioner's direct appeal from his second conviction and sentencing is reported at 929 S.W.2d 909, and is reprinted at pages 54a-68a of the appendix to this petition. The Court of Appeals of the Western District of Missouri's *per curiam* affirmance of the lower court's denial of petitioner's motion for post-conviction relief is not officially reported, but is reprinted at page 53a of the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of petitioner's federal writ of habeas corpus on January 29, 2002 and denied petitioner's petition for rehearing *en banc* on March 29, 2002. On June 19, 2002, Justice Thomas extended the time for filing a petition for certiorari to and including July 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT

This case presents an important and recurring question of federal constitutional law on which the lower courts are hopelessly divided: How does the Due Process Clause's guarantee against judicial vindictiveness in criminal sentencing, as established in *North Carolina v. Pearce,* 395 U.S. 711 (1969), apply to sentencing after a successful appeal involving multiple-count convictions?

1. On January 26, 1994, petitioner was convicted in a Missouri state court of five counts of sodomy and one count of rape. Although under Missouri law the trial judge could have imposed six consecutive life sentences on those counts, *see* Mo. Rev. Stat. §§ 566.030, 566.060 (1991), he instead imposed five concurrent twenty-year sentences on the sodomy counts, and a consecutive twenty-year sentence on the rape count, for a total prison term of forty years. Petitioner appealed, arguing that the court had improperly admitted evidence of uncharged misconduct. On February 1, 1995, the Missouri Court of Appeals agreed, overturned petitioner's

convictions, and remanded the case for a new trial. App. 69a-74a.

2. A second jury acquitted petitioner of the rape charge, but again convicted him of the five sodomy charges. After this second conviction, the trial judge doubled the sentence he had previously imposed on the sodomy counts, giving petitioner five concurrent *forty-year* sentences. Thus, despite his acquittal on the rape charge, petitioner's total prison sentence was the same forty-year sentence he had received after the first trial. In his remarks to the trial judge before imposition of sentence, counsel for petitioner argued that doubling petitioner's sentence on the sodomy counts after his successful appeal and subsequent acquittal on the rape charge was "punitive" with respect to petitioner's successful appeal. App. 8a. The trial judge nonetheless sentenced petitioner to forty years' imprisonment, and was completely silent as to his reasons for doubling petitioner's sentences on the sodomy convictions.

3. On direct appeal, petitioner argued that the new, doubled sentence of forty years' imprisonment violated *Pearce*. The Missouri Court of Appeals overturned one sodomy conviction for insufficient evidence but upheld the other four sodomy convictions and petitioner's forty-year sentence. App. 54a-68a.

4. Petitioner then sought post-conviction relief from the Missouri state courts, arguing, *inter alia*, that the trial court had imposed an increased sentence after his appeal in violation of *Pearce*. The Circuit Court of Jackson County, Missouri, denied petitioner's petition, and the Missouri Court of Appeals affirmed *per curiam*. App. 53a.

5. Next, petitioner filed a federal petition for a writ of habeas corpus, arguing that the state court violated *Pearce* by doubling his sentence on the sodomy counts after he successfully appealed his initial convictions. The district court denied relief (App. 22a-52a), but granted petitioner a certificate of appealability. App. 18a-21a.

6. a. A divided panel of the Eighth Circuit affirmed. The panel majority rejected petitioner's claim that his sentences violated *Pearce*, on the ground that the total punishment given by the second sentences had not increased beyond the total punishment imposed by the original sentences. App. 1a-12a. The majority premised its conclusion largely on the fact that "[m]ost" of its "sister circuits" had concluded "that the total sentences should be compared" (App. 5a), and on this Court's post-*Pearce* decisions that "have not broadly extended the *Pearce* presumption of vindictiveness." App. 6a (citing *Alabama v. Smith,* 490 U.S. 794 (1989) and *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973)).

b. Judge Richard Arnold dissented, urging that "[q]uite simply," petitioner did receive "a more severe sentence" because he "was convicted of fewer crimes at his second trial. Yet his sentence was the same as that following his first trial." App. 13a. Judge Arnold added that "[o]ur sister circuits are split on the application of *Pearce* to multi-count cases" (App. 14a), but that in his view, "the better approach is that used by the Second and Eleventh Circuits." App. 14a (citing *United States v. Markus,* 603 F.2d 409 (2d Cir. 1979) and *United States v. Monaco,* 702 F.2d 860 (11th Cir. 1983)). In Judge Arnold's view, the majority's conclusion was "precisely the type of result that chills appeals by criminal defendants, who may believe that the increased sentence after retrial results from judicial vindictiveness." App. 15a.

7. Petitioner's petition for rehearing *en banc* was denied on March 29, 2002. Judge Morris Arnold would have granted rehearing *en banc*. App. 75a.

REASONS FOR GRANTING THE WRIT

This case presents a significant and recurring issue which arises from this Court's decision in *North Carolina v. Pearce,* 395 U.S. 711 (1969): the proper application of *Pearce*'s presumption of vindictiveness where multiple-count indictments and convictions are involved. Since *Pearce* was decided, a substantial and mature conflict has developed on this issue in the courts of appeals and the state courts. Ten of the twelve federal circuit courts that hear criminal or habeas corpus cases, and six state courts of last resort, have addressed the issue in well over two dozen published decisions, but are in hopeless conflict with one another: No clear rule emerges from these divergent opinions.

The majority opinion of the Court of Appeals in this case — which itself recognized the division in the courts — conflicts with several of these decisions, and further conflicts with this Court's directions in *Pearce*. Because of the serious conflict among the circuits and state courts, and because the issue is indisputably an important one, certiorari should be granted.

I. THE COURTS ARE DIVIDED WITH RESPECT TO APPLYING *PEARCE* TO MULTI-COUNT SENTENCES

In *Pearce*, this Court held that due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725. Moreover, "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.* To enforce this due-process guarantee, *Pearce* required that a first sentence serve as a presumptive ceiling on the second sentence, so that "whenever a judge imposes a more severe sentence upon a defendant after a new trial," the judge must state, on the record, reasons for the more severe sentence that are "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726. Absent the judge's articulation of such "objective information" concerning post-first-sentencing conduct, the *Pearce* presumption is conclusive.

There is a deep, mature, and widely recognized split among the courts of appeals and state courts of last resort regarding application of *Pearce*'s presumption of vindictiveness to sentences involving multiple-count indictments. The split was recognized by both the majority and dissent in the Court of Appeals below. App. 5a (majority opinion); 14a (R. Arnold, J., dissenting). Numerous other courts have likewise recognized the conflict, as well as the attendant "confusion," "controversy," and "muddl[e]" that the conflict has exacerbated in the law. *See, e.g., United States v. Campbell*, 106 F.3d 64, 67-68 (5th Cir. 1997) (noting that application of *Pearce* in this context "has been the subject of some confusion in this Circuit and among our sister circuits," and that "our *Pearce* cases have been somewhat 'muddled'"); *United States v. Vontsteen*, 950 F.2d 1086, 1092-93 (5th Cir. 1992) (stating that the application of *Pearce* to multi-count indictments and convictions is the subject of "some controversy in this and the other circuit courts"); *United States v. Mancari*, 914 F.2d 1014, 1018-19 (7th Cir. 1990) (recognizing split); *People v. Young*, 723 N.E.2d 58, 63 n.1 (N.Y. 1999) (recognizing split).

And the conflict has been recognized by commentators, including noted authorities in the field of criminal procedure. *See, e.g.,* Wayne R. LaFave, Jerold J. Israel, & Nancy J. King, *Criminal Procedure* § 26.8(a) n.5 (2d ed. 1999) (noting conflict among courts of appeals over "the question of how the comparative severity of the first and second sentence should be measured"); Jonathan Youngwood, *The Presumption of Judicial Vindictiveness in Multi-Count Resentencing*, 60 U. Chi. L. Rev. 725, 725 (1993) ("The circuits often differ, however, on the application of *Pearce* to resentencing in cases involving multi-count convictions.").

The disagreement revolves around a seemingly simple question: how the courts should determine whether multiple sentences received after a second trial are "more severe," thereby triggering *Pearce*'s presumption. The cases disclose a number of conflicting approaches to the problem, several of which would have limited petitioner's resentencing on the sodomy counts to the same twenty years' imprisonment that the trial judge originally imposed.

The "Aggregate Package" or "Total Sentence" Rule. One approach, applied by the Eighth Circuit majority in this case, considers whether a subsequent sentence is "more severe" by applying an "aggregate package" or "total sentence" rule. Seven Circuits and two highest state courts have adopted this rule. *See, e.g.*, App. 5a-8a; *United States v. Sanders*, 197 F.3d 568 (1st Cir. 1999), *cert. denied*, 530 U.S. 1238 (2000); *Kelly v. Neubert*, 898 F.2d 15 (3d Cir. 1990); *United States v. Campbell*, 106 F.3d 64, 67-68 (5th Cir. 1997); *United States v. Mancari*, 914 F.2d 1014 (7th Cir. 1990); *United States v. Bay*, 820 F.2d 1511 (9th Cir. 1987); *United States v. Sullivan*, 967 F.2d 370 (10th Cir. 1992); *Johnson v. United States*, 628 A.2d 1009, 1014 (D.C. 1993); *Maine v. Keefe*, 573 A.2d 20, 22 (Me. 1990). These courts hold that, so long as the total sentence on all remaining counts after the second trial does not exceed the total sentence on *all* counts at the conclusion of the first trial, the second sentence is not "more severe" for purposes of the *Pearce* presumption.

The theory behind the "aggregate package" approach is that sentences on multiple convictions are always a "package" deal, so that whenever "an appellant's challenge implicates the sentencing scheme with respect to interrelated or intertwining counts," there is no basis for presuming vindictiveness unless the total package of sentences increases after the successful appeal. *Campbell,* 106 F.3d at 67 (quotation omitted). Contrary to *Pearce,* in which this Court held that the only basis validly justifying a post-appeal sentence increase would be "objective information" about "identifiable conduct" by the defendant "occurring after the time of the original sentencing," 395 U.S. at 726, the courts adopting the "aggregate package" rule reason that it gives trial courts the "inherent flexibility . . . to reconsider the entirety of the (now-changed) circumstances and fashion a sentence that fits the crime and the criminal" (*Campbell,* 106 F.3d at 68), and thereby to "redesign [the] sentencing package." *Mancari,* 914 F.2d at 1021.

Many of the decisions adopting the "total sentence" or "aggregate package" approach have been accompanied by vigorous dissents, which highlight the real risk of vindictiveness inherent in the "aggregate package" approach, as well as the "fiction[al]" nature of allowing such freewheeling redesign of sentences. *See* App. 13a (R. Arnold, J., dissenting) ("Mr. Sexton was convicted of fewer crimes at his second trial. Yet, his sentence was the same as that following his first trial. Quite simply, this is a more severe sentence."); *United States v. Pimienta-Redondo*, 874 F.2d 9, 19 (1st Cir. 1989) (*en banc*) (Coffin and Bownes, JJ., dissenting) (noting that although "the total sentence remained the same, . . . *Pearce* directs us to adopt a presumption in favor of the defendants, not the sentencing judge" and calling the majority's approach "demeaning" and an "unnecessary fiction"); *Bay*, 820 F.2d at 1516 (Canby, J., dissenting) ("It is simply wrong to treat [defendant's] new sentence as the same kind of 'package' as his original sentence, and to shield it from the *Pearce* presumption simply because there is no net increase in the total sentence originally imposed."); *see also id.* at 1515 (Skopil, J., concurring) (indicating that he viewed himself bound by a prior panel decision but "writ[ing] separately to express [his] concern about the trial court's failure to give any reasons for the new sentence," which "was increased from five years probation to twenty years incarceration"). Indeed, one commentator has suggested that "the most vigorous and well-reasoned opposition to the 'aggregate package' approach comes in the form of dissents to the 'aggregate package' court opinions." Youngwood, 60 U. Chi. L. Rev. at 737-38.

The Modified "Aggregate Package" Rule. Another court of appeals has adopted a modified version of the "aggregate package" approach. In *United States v. Townsend*, 178 F.3d 558, 570 (D.C. Cir. 1999), the court held that *only if* the original sentences are "properly viewed as a package" is the *Pearce* analysis properly conducted in the aggregate. Although the court opined that it "need not determine today the full range of cases in which a sentence on multiple counts may properly be treated as a package (*id.*), it concluded that "sentences which include [18 U.S.C. §] 924(c) counts" are "particularly well suited to be treated as a package." 178 F.3d at 567. For that reason, the court in *Townsend,* which involved just such a count, concluded that the post-appeal increase in the sentences on certain counts gave rise to no presumption of vindictiveness. *Id.* at 570.

The "Remainder" Rule. Three courts of appeals and one highest state court have adopted the "remainder" approach, holding that in determining whether the later sentences are "more severe," thereby triggering the *Pearce* presumption, the second sentence must be compared to the first sentence, once the punishment that was imposed for dropped, dismissed, or acquitted counts is subtracted from the earlier sentence. *See United States v. Monaco*, 702 F.2d 860 (11th Cir. 1983); *United States v. Markus*, 603 F.2d 409 (2d Cir. 1979); *Midgett v. McClelland*, 547 F.2d 1194 (4th Cir. 1977); *Connecticut v. Carpenter*, 595 A.2d 881, 883 (Conn. 1991).

Under the reasoning of these courts, a second sentence is "more severe," and therefore triggers a rebuttable presumption of vindictiveness, if the second sentence exceeds the lawful remainder of the first sentence, even if the total sentence received after the second trial is equal to or less than the total sentence received after the first trial. *See Monaco*, 702 F.2d at 885 (excluding the sentence attributable to the dismissed count and finding that "the valid aggregate sentence of the first trial . . . was increased"); *Markus*, 603 F.2d at 413 (holding that "[i]t is the actual effect of the new sentence as a whole on the total amount of punishment lawfully imposed" on the defendant "which is the relevant inquiry"); *Midgett*, 547 F.2d at 1197 (similar). This rule has the virtue of recognizing that retaliation is at least as likely to occur when multiple counts are at issue as where a single count is involved. *See* App. 16a (R. Arnold, J., dissenting) ("defendants convicted of multiple counts may be *more* likely to face retaliation upon retrial than defendants convicted of a single count") (emphasis added). Had it been adopted by the Court of Appeals below, the "remainder rule" would have yielded a different result in petitioner's case.[1]

The "Count-by-Count" Rule. The Illinois Supreme Court and the Pennsylvania Supreme Court employ yet another approach — the "count-by-count" approach — comparing the first and second sentences on each individual remaining count to determine whether the second sentence is more severe. *See People v. Kilpatrick*, 657 N.E.2d 1005, 1008 (Ill. 1995) (holding that trial court could not impose a longer sentence after a successful appeal, despite the fact that the aggregate period of imprisonment remained the same); *Commonwealth v. Pearson*, 303 A.2d 481, 485 (Pa. 1973) (rejecting aggregate total comparison and instead comparing previous and current sentence on individual count). This count-by-count approach recognizes that each sentence is imposed separately for each separate violation of a criminal law, and, like the "remainder" approach, protects against the vindictive increase of any individual sentence. *See, e.g., Pearson,* 303 A.2d at 475 ("The sentence imposed on each count is controlling."). This rule, had it been adopted by the Court of Appeals below, would, like the "remainder" approach, have yielded a different result in petitioner's case.

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[1] There is even conflict *within* the Circuits as to the proper understanding of *Pearce*, which only underscores the need for review here. The Second and Fourth Circuits, despite adopting the "remainder" approach, *see Markus*, 603 F.2d 413; *Midgett*, 547 F.2d 1194, have in later panel opinions utilized an "aggregate package" approach without any discussion of *Markus* or *Midgett*. *See United States v. Diaz*, 834 F.2d 287 (2d Cir. 1987); *United States v. Gray*, 852 F.2d 136 (4th Cir. 1988); *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983); *see also* App. 6a n.3 (noting this internal inconsistency in the Fourth Circuit).

No Rule. New York has declined to adopt either the "aggregate package" or the "count-by-count" approaches as "an intractable rule," instead applying a presumption-less approach and holding that "where a defendant receives a greater sentence on an individual count, but an equal or lesser over-all sentence, courts must examine the record to determine whether there is a reasonable likelihood that the enhanced sentence on the individual count was the result of vindictiveness." *Young*, 723 N.E.2d at 63. This holding was necessary, according to the New York court, to "preserv[e] the flexibility and discretion of sentencing courts." *Id.*

Unless and until this Court finally resolves this issue, an individual's exposure to an increased sentence after a successful appeal will depend entirely on where the case arises. Under either the "remainder" approach of the Connecticut Supreme Court and the Second, Fourth, and Eleventh Circuits, or the "count-by-count" method adopted by the Supreme Courts of Illinois and Pennsylvania, petitioner's sentences after the new trial would have been limited to a total of twenty years, since the sentencing judge articulated no objective information, based on events occurring after the first sentence, that could possibly have formed the basis for petitioner's increased punishment. These two approaches are also consistent with *Pearce*, whereas the others are not. Certiorari should be granted to resolve this conflict.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH *NORTH CAROLINA v. PEARCE* AND ITS COMPANION CASE, *SIMPSON v. RICE*

A. This Court In *Simpson v. Rice* Applied The "Remainder" Rule, Not The "Aggregate Package" Approach

In *Pearce,* this Court consolidated two cases presenting the question of whether, and to what extent, the Constitution limits the imposition of a "more severe" sentence after conviction and retrial. The case which gave its name to the decision, *Pearce v. North Carolina*, 397 F.2d 253 (4th Cir. 1968), involved a retrial and resentencing on a single count. But the other case, *Simpson v. Rice*, 396 F.2d 499 (5th Cir. 1968), involved multiple counts and touches upon the issue at the heart of this case.

In the latter case, Rice pled guilty and was sentenced on four burglary counts. He received one four-year sentence and three two-year sentences to be served consecutively, for a total sentence of ten years. *Pearce*, 395 U.S. at 715 n.3. Rice's convictions were later set aside, and he was subsequently tried on only three of the burglary counts (the prosecution dropped one of the burglary counts prior to the subsequent trial). *Id.* at 715 n.4. After a trial, Rice was convicted on all three remaining counts. But instead of the sentences of four years, two years, and two years that he had received earlier, he received sentences of ten years, ten years and five years on the same respective counts. *Id.* This Court concluded that Rice's second sentences gave rise to a presumption of vindictiveness, and held that the unexplained and unjustified increase in Rice's original sentences violated due process. *Id.* at 726.

Significantly, this Court *did not* simply compare the first and second aggregate sentences to reach this conclusion. Instead, this Court approvingly quoted the trial judge (Frank M. Johnson, Jr.), who concluded that the increase in Rice's punishment "in these *three cases* [was] over *threefold*." *Id.*

(emphasis added) (quoting 274 F. Supp. 116, 121 (M.D. Ala. 1967)). Thus, the Court endorsed Judge Johnson's use of the same "remainder" approach followed by the Second, Fourth, and Eleventh Circuits, and the Connecticut Supreme Court: It compared the second sentences (twenty-five years) to the first sentences (eight years) only after first subtracting the dropped or acquitted count. Significantly, had the Court instead used the Eighth Circuit's "aggregate package" approach, it would have compared the twenty-five year second package of sentences to the *ten-year* first package (which would not have been "over threefold"), although the result would have been the same.[2]

Contrary to the approach taken in *Simpson v. Rice*, the Eighth Circuit majority compared only the total sentences after each set of convictions. The majority quoted with approval the Missouri Court of Appeals' contention that when sentencing after a new trial, a court has "authority to re-evaluate the sentencing package *in light of the changed circumstances* and resentence the defendant to effectuate the original sentencing intent without violating *Pearce*." App. 5a (emphasis supplied). To be sure, petitioner's sentence could have been increased based on changed circumstances if the court had articulated a constitutionally valid reason for its increase — *Pearce* explicitly allows for an increase "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726. But that is not what occurred here. The only changed circumstance articulated was that petitioner had one *less* conviction at resentencing — a change which could not, consistent with due process, lead to a twenty-year sentence *increase*. And even then, that changed circumstance was only articulated by the prosecution and the courts after the fact; the sentencing court was silent as to the reasons for the increase.

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[2] One aspect of *Simpson v. Rice* has since been overruled by this Court, but that development did not affect the Court's reasoning on the multiple-count issue presented here. In *Alabama v. Smith*, 490 U.S. 794 (1989), this Court held that the *Pearce* presumption does not apply where the first sentence is imposed after a guilty plea, and the second one after trial, therefore overruling that aspect of *Simpson v. Rice* because it was "decided before some important developments in the constitutional law of guilty pleas," including the encouragement of guilty pleas with more lenient sentences. *Id.* at 802-03.

B. The "Remainder" Or "Count-By-Count" Rule Is The Correct One

Even aside from *Simpson v. Rice*'s adoption of the "remainder" rule, that rule (or its close cousin, the "count-by-count" approach) is the one that best implements the Due Process Clause protections of *Pearce,* because it most accurately reflects the nature of a criminal charge. The contrary, "aggregate package" approach of the Court of Appeals below adopts what is in essence a fiction: that criminal sentences are imposed for a "package" of conduct. That is wrong: Sentences, even where multiple counts are at issue, are specific punishments for specific violations of specific criminal laws.

Whether in a single-count or a multiple-count charging instrument, criminal defendants are accused of violating specific criminal laws through specific criminal acts. Juries must convict or acquit based on whether those specific charges are made out. Legislatures typically prescribe specific ranges of punishment for each individual crime. To then approach the sentencing of a defendant as a "package" is, as Judges Coffin and Bownes have opined, a "demeaning" view of the substantive criminal statutes that underlie a sentence, *Pimienta-Redondo*, 874 F.2d at 19 (Coffin and Bownes, JJ., dissenting), which minimizes the importance of the crime itself.

A sentence "is the *specific* consequence of a *specific* violation of a *specific* statute." *United States v. Henry*, 709 F.2d 298, 310 (5th Cir. 1983). Thus, approaching the question of whether a second sentence is "more severe" on a "valid remainder" or "count-by-count" basis is the rule most coherent with the nature of a criminal charge and conviction. Viewing each sentence separately, moreover, has the virtue of being consistent with the definition of "same offense" under the Double Jeopardy Clause, whereas the "aggregate package" approach is not. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (two statutory offenses may arise from a single act if one offense "requires proof of an additional fact which the other does not"); *Brown v. Ohio*, 432 U.S. 161, 165-66 (1977) (same); *see generally* Youngwood, 60 U. Chi. L. Rev. at 745 & n.113.

Both federal and state law require that each sentence on each charge be viewed independently. In the realm of federal sentencing, "[a] federal court's authority to impose a particular criminal punishment is derived solely from Congress's decision to prescribe certain punishments for certain criminal behavior." Michael F. Doss, *Resentencing Defendants and the Protection Against Multiple Punishment*, 133 U. Pa. L. Rev. 1409, 1416 (1985) (citing *Whalen v. United States*, 445 U.S. 684, 689 (1980)). Even under the United States Sentencing Guidelines, which adopt a broad approach to "relevant conduct," judges must still ascertain the characteristics of each individual *offense* when making the sentencing decision. *See id.* at 1417 ("[t]he federal Sentencing Reform Act of 1984 supports this view of sentences by requiring the trial court to consider the characteristics of '*each offense* for which a term of imprisonment is being imposed' when determining sentences following multiple count convictions").

Indeed, that is specifically the rule under Missouri law: As Judge Arnold pointed out in dissent, Missouri law makes clear that "defendants are given a sentence for each crime of which they are convicted." App. 16a (citing Mo. Rev. Stat. § 557 (Cum. Supp. 1992)). Moreover, this is generally true across all of the state criminal-law regimes: "At every step in the criminal process, sentences attached to individual crimes, even those in a multi-count indictment, are handled separately from one another. Legislatures have assigned every statutory crime its own individual potential punishment. . . . Trying a set of crimes together does not mean that they or the punishments attached to them become inseparable." Youngwood, 60 U. Chi. L. Rev. at 746.

This is confirmed by the collateral consequences of petitioner's first and second sets of sentences under Missouri law. Missouri law provides that each sentence of imprisonment consists of two components: the prison term and the "conditional release term." *See* Mo. Rev. Stat. § 558.011 (1991). For felony sentences of greater than fifteen years, the conditional release term is five years, and the prison term is the balance. Mo. Rev. Stat. § 558.011(4)(c) (1991). Petitioner's first forty-year set of sentences, which was composed of a twenty-year sentence for rape and a consecutive set of concurrent twenty-year sentences for sodomy, would have yielded total prison terms of thirty years, and conditional release terms totaling ten years. Under his second set of sentences, his forty-year sentence will yield a longer (thirty-five-year) prison term and a shorter (five-year) conditional release term. There is therefore little question that, under any view of the proper rule to apply here, petitioner's second sentence was "more severe," and the lower courts have agreed on similar facts. *See, e.g., United States v. Steele,* 988 F.2d 998 (9th Cir. 1993); *United States v. Gilliss,* 645 F.2d 1269 (8th Cir. 1981); *United States v. Hawthorne,* 532 F.2d 318 (3d Cir. 1976).

C. The Court Of Appeals' Reasons For Not Applying *Pearce* Were Untenable

The Court of Appeals majority relied on two primary reasons for concluding that petitioner's doubled sentence on the sodomy convictions was not "more severe" than the earlier one. Neither one withstands scrutiny.

First, the majority suggested that the *Pearce* presumption should not apply because several later decisions of this Court "have not broadly extended the *Pearce* presumption." App. 6a (citing *Alabama v. Smith*, 490 U.S. 794 (1989) and *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973)). But neither case even remotely suggests that *Pearce* should not apply here. *Alabama v. Smith*, as noted earlier (n.2, *supra*), simply held that there is no basis for presuming vindictiveness when the first sentence follows a guilty plea and the second, more severe sentence follows a trial. 490 U.S. at 801. Similarly, *Chaffin* declined to extend *Pearce* to a system of jury sentencing, since there would be no likelihood of vindictiveness where the second sentencing jury had no involvement in or knowledge of the first sentence. *Chaffin*, 412 U.S. at 26-27. This case does not involve anything remotely similar to a sentence after a guilty plea, as in *Alabama v. Smith*, nor to a regime of jury sentencing, as in *Chaffin*.

But the panel majority's concern was incorrect — it was not necessary to "extend" *Pearce* at all to give petitioner relief in this case. All that is necessary is that *Pearce* be applied. The multiple-count scenario presented by this case and so many of the divergent lower-court decisions poses at least as great a risk of vindictiveness as did the single-count scenario in *Pearce*. *See* App. 16a (R. Arnold, J., dissenting). Indeed, petitioner's circumstances are remarkably similar to Pearce's — petitioner was convicted by a jury and sentenced by the trial court judge; his convictions were overturned and his case remanded for a new trial; the same trial court judge, without any explanation, resentenced petitioner to a longer sentence than he previously received. If anything, the treatment that the judge accorded petitioner here was even more egregious, and even more indicative of vindictiveness, than that given to Pearce. In *Pearce*, the defendant's original sentence, on the sole count of the indictment, was twelve to fifteen years, and his second sentence was only three years longer. 395 U.S. at 713 & n.1. Here, petitioner received five concurrent forty-year sentences for his offenses, when he had earlier received five concurrent twenty-year sentences *for the exact same offenses*, with no change (other than the appeal and acquittal) in the interim. *Pearce* should have protected petitioner here, without any need for an "extension" of that decision.

Second, the Eighth Circuit majority claimed to find support for its decision in the sentencing discretion given to judges under Missouri state law. It explained that Missouri statutes gave the sentencing court discretion to "decide the extent or duration of sentence . . . under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant." App. 7a (quoting Mo. Rev. Stat. §§ 557.036.1 (Supp. 1992) and 566.060.2 (Supp. 1990)). But that is scarcely different than the broad and traditional discretion that was committed to the North Carolina and Alabama judges in *Pearce* and *Simpson v. Rice*. *Pearce*'s due process-based presumption is a check on this sort of otherwise-unfettered discretion — a "constitutional limitatio[n] . . . upon [the] general power of a judge." 395 U.S. at 719. That is why Pearce and Rice's sentences were held unconstitutional, even though their increased sentences would have been permissible under state law. *Id.* at 719 n.14. Indeed, it is precisely *because* judges have so much otherwise-unchecked sentencing power under state law that the *Pearce* presumption exists — to guard against vindictive excesses of that state-law power. The broad discretion of the Missouri sentencing regime is exactly the reason *for* the *Pearce* presumption, not a reason for refusing to apply it.

D. Multiple-Count Resentencing Presents ~~The~~ The Same Risks of Vindictiveness That This Court Identified In *Pearce*

The Court of Appeals majority failed to apply *Pearce* in large part because it failed to comprehend that the risks of judicial and prosecutorial vindictiveness are just as great, and just as violative of due process, where the defendant is charged and convicted upon multiple counts. Certainly, *Simpson v. Rice* stands for this proposition. And a straightforward look at what occurred here only confirms that actual vindictiveness may well be hidden by the majority's approach to multiple-count resentencing.

As the dissent below noted, the majority's "aggregate package" approach carries with it substantial risks of actual vindictiveness, perhaps even greater than those faced by defendants in single-count cases:

> Indeed, defendants convicted of multiple counts may be more likely to face retaliation upon retrial than defendants convicted twice of a single count. In Mr. Sexton's case, the same judge witnessed a jury convict him of rape and later witnessed a different jury acquit him. A result such as this may seem to a judge to be an unfair "bonus" result of securing a new trial. Or, as in a single count case, a judge may be angry at a defendant for having taken an appeal that forced him to retry the case. These reasons are retaliatory and forbidden by due process.

App. 16a (R. Arnold, J., dissenting).

One commentator has similarly described the "aggregate package" theory's concerns for "vindictiveness" as "too limited":

> In the classic *Pearce* case, the judge has violated the defendant's right to due process by, in effect, declaring "I'll show you there's a price to pay for appealing one of my decisions." Such a statement does not appear significantly

> different, nor more vindictive, than the judge in the multi-count case who, by adopting the "aggregate package" approach, says "I'll show you there's no profit in appealing one of my decisions." Both actions punish the defendant by negating her wholly legal and proper appellate efforts; they both deprive her of the right to attempt to reduce her punishment.

Youngwood, 60 U. Chi. L. Rev. at 747-48. But the trial judge here articulated no reasons whatsoever for petitioner's doubled sentence; without such a justification, there was more than a reasonable or realistic chance that the judge doubled the sentence out of anger, or out of a desire to show petitioner "there's no profit in appealing one of my decisions."

Vigilance against the risk of such vindictiveness is also especially critical where state-court judges, facing contested or retention votes before the public, must run for reelection on their judicial records. *See Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2538-39 (2002). Indeed, this Court in *Republican Party of Minnesota* itself recognized that "elected judges . . . *always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench," specifically hypothesizing the case of a judge who frees a notorious criminal and thereby "places his job . . . at risk." *Id.* at 2538. *See also id.* at 2555-56 (Ginsburg, J., dissenting) (noting due process concerns).

Without the *Pearce* presumption, however, which requires a judge to articulate his reasons or stick to the original sentence, there would be no opportunity for defendants to make a case for vindictiveness in the courts. Applying *Pearce* would simply require the judge to articulate his valid, neutral reason for increasing a defendant's sentence, and would allow defendants to effectively challenge those stated reasons before the appellate courts, where appropriate. "Furthermore, allowing a judge to leave the total sentence unchanged after she has dismissed certain counts, without justifying this decision through objective information, might actually discourage judges from seriously reexamining their initial package of punishments." Youngwood, 60 U. Chi. L. Rev. at 741.

III. THE QUESTION PRESENTED BY THIS CASE IS IMPORTANT AND RECURRING

The multitude of conflicting decisions alone demonstrate that the question presented by this petition is important and recurring: Ten circuits and six state supreme courts have weighed in, and disagreed, about when a sentence imposed after retrial is "more severe," so as to trigger *Pearce*'s presumption. The split encompasses more than two dozen published decisions from the federal courts of appeals and state courts of last resort.

The importance of this issue, and the need for this Court's review, is confirmed by the wide divergence of judicial views regarding the application of *Pearce*'s presumption to resentencing of a case with multiple counts. As the Fifth Circuit has noted, this issue has caused confusion and controversy in the circuits. *See Campbell*, 106 F.3d at 67-68; *Vontsteen*, 950 F.2d at 1092-93. Even the courts that have sided with the Eighth Circuit here have typically done so only over vigorous dissent. The division in the lower courts demonstrates that there is no need for further percolation of the issue in the lower courts, and no hope that the conflict will resolve itself without this Court's intervention.

But the importance of the issue is not shown merely by the number of conflicting decisions on the issue. Multiple-count charging instruments, and thus convictions, are now the rule and not the exception in both federal and state courts. *See, e.g.,* Tat Man J. So, *Double Jeopardy, Complex Crimes and* Grady v. Corbin, 60 Fordham L. Rev. 351, 351 n.2 (1991) (noting rise in multi-count indictments in recent years). As the president of the National Association of Criminal Defense Lawyers recently wrote, "Prosecutions have become more complex with the increasing popularity of multiple count indictments." Judy Clarke, *Open Letter to Attorney General Reno,* 20 The Champion 9 (Dec. 1996). Charging multiple counts "provides the government with a strong bargaining position" in plea bargaining, because prosecutors can then drop counts "in exchange for guilty pleas and cooperation." John J. Bryne, *et al., Examining the Increase in Federal Regulatory Requirements and Penalties: Is Banking Facing Another Troubled Decade?,* 24 Cap. U. L. Rev. 1, 32 (1995). Additionally, federal prosecutors have in certain enforcement arenas "pursued a policy of including multiple count indictments in an effort to maximize penalties." Amy Schofield & Linda D. Weaver, *Health Care Fraud,* 37 Am. Crim. L. Rev. 617, 653 (2000) (citing DOJ Manual). Thus, in light of the prevalence of multiple-count criminal cases, the importance of this Court's review cannot be understated.

Finally, the proper application of *Pearce*'s presumption of vindictiveness is obviously important to individual defendants such as petitioner, a 51-year-old man who, under the Eighth Circuit's application of *Pearce*, now faces imprisonment until age 91, when after he was acquitted on the rape count, he reasonably should have expected no more than the same twenty-year sentences he previously received on the sodomy counts. At a minimum, he should have received an explanation from the judge that justified this harsher result — a sentence he could not legally have faced in Illinois, Pennsylvania, or in federal courts in the Second, Fourth, or Eleventh Circuits. It is critical that *Pearce* be applied uniformly to multiple-count sentences throughout the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
PATRICK J. BERRIGAN
WATSON & DAMERON
2500 Holmes Road
Kansas City, MO 64108
(816) 474-3350

GREGORY A. CASTANIAS
(*Counsel of Record*)
ELIZABETH REES
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

July 29, 2002

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278 F.3d 808

UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

John SEXTON, Petitioner—Appellant,
v.
Mike KEMNA, Respondent—Appellee.

No. 00-2764.

Submitted: Sept. 12, 2001.
Filed: Jan. 29, 2002.
Rehearing and Rehearing En Banc Denied
March 29, 2002.

Before LOKEN, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

LOKEN, Circuit Judge.

Missouri inmate John Sexton appeals the denial of his petition for a writ of habeas corpus. Sexton argues that the state courts violated *North Carolina v. Pearce,* 395 U.S. 711 (1969), by imposing the same forty-year sentence for fewer counts of conviction after Sexton successfully appealed his initial conviction. He further argues the evidence was constitutionally insufficient to convict him of sodomy, he was denied his constitutional right to confront the victim at trial, and he was denied effective assistance of counsel. We affirm.

I. Background.

In January 1994, a jury convicted Sexton of one count of rape and five counts of sodomy.

The victim was Sexton's minor stepdaughter, R.C. The trial court sentenced him to five concurrent twenty-year sentences on the sodomy counts and a consecutive twenty-year sentence on the rape count, for a total prison term of forty years. On appeal, the Missouri Court of Appeals overturned the convictions and remanded for a new trial. *State v. Sexton,* 890 S.W.2d 389, 392 (Mo. App. 1995).

At the second trial, Sexton was again charged with one count of rape and five counts of sodomy.[1] R.C. testified that Sexton's abuse began shortly after her mother married him, when R.C. was nine years old. The abuse usually occurred when R.C.'s mother was at work. R.C. testified that Sexton demanded oral sex three to four times a week from the time she was approximately ten years old until she reported the abuse in November of 1992. In addition to coercing oral sex, R.C. testified that Sexton touched her vagina, breasts, and buttocks with his fingers and tongue, placed his penis in her vagina on numerous occasions, and at least once inserted his penis into her rectum. Early in the abuse period, Sexton threatened to kill R.C. if she ever told anyone about his conduct or tried to leave his home. Later, Sexton and his wife forced R.C. to take birth control pills, justifying the measure as a means of preventing pregnancy if R.C. were ever raped. Sexton also used sexual abuse to control and punish R.C., demanding sexual contact if R.C. wished to associate with friends, and forcing her to choose between a whipping and oral sex if she misbehaved.

The second jury found Sexton not guilty of the rape charge, but convicted him of the five sodomy charges. The trial court sentenced him to five concurrent forty-year terms for the sodomy offenses. Thus, his total sentence was again a forty-year prison term. On direct appeal, the Missouri Court of Appeals overturned one sodomy conviction because the victim did not testify to any instance of that type of deviate sexual intercourse. The court upheld the other four sodomy convictions, rejected Sexton's argument under *North Carolina v. Pearce,* and affirmed his forty-year sentence. *State v. Sexton,* 929 S.W.2d 909, 918 (Mo. App. 1996).

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[1] Each sodomy count alleged a different type of "deviate sexual intercourse" as defined in the governing statute, Mo. Rev. Stat. § 566.010.2 (Supp. 1990) ("any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person"). Missouri law at the time defined sodomy as "deviate sexual intercourse with another person to whom he is not married who is less than fourteen years old." Mo. Rev. Stat. § 566.060.3 (Supp. 1990).

After the Missouri courts denied his motion for state post-conviction relief as untimely, Sexton filed this petition for a federal writ of habeas corpus. The district court[2] denied relief but granted him a certificate of appealability on five issues. Sexton's counsel filed briefs addressing three of those issues. Sexton filed pro se briefs addressing the other two.

II. Discussion.

The Anti-terrorism and Effective Death Penalty Act of 1996 amended the federal habeas corpus statute to provide that relief may not be granted to a person in state custody unless the underlying state proceeding:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court recently clarified the proper interpretation § 2254(d)(1). Writing for a majority of the Court on this issue, Justice O'Connor explained that the "contrary to" clause limits habeas relief to cases in which "the state court arrives at a conclusion opposite to that reached by

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[2] The HONORABLE ORTRIE D. SMITH, United States District Judge for the Western District of Missouri.

this Court on a question of law or . . . decides a case differently than this Court has on a set of materially indistinguishable facts." The "unreasonable application" clause permits the writ to issue only "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor,* 529 U.S. 362, 402-13 (2000).

A. The *North Carolina v. Pearce* Issue.

In *North Carolina v. Pearce,* the Supreme Court considered whether the U.S. Constitution limits the discretion of state courts in sentencing criminal defendants who successfully appeal their initial convictions but are convicted again after a new trial. The Court emphasized that there is no constitutional bar to imposing a more severe sentence after the second conviction. 395 U.S. at 723. However, "Due Process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.* at 725. To guard against the danger of vindictiveness, the Court held that, "whenever a judge imposes a more severe sentence upon a defendant after a new trial," the record must demonstrate that the greater severity was based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726.

Sexton argues that the forty-year sentence imposed after his second trial violates this principle. Though he received a total sentence of forty-years after each trial, Sexton explains that his second sentence was more severe, and therefore *Pearce*'s pre-sumption of vindictiveness applies, because (i) the second jury found him not guilty of the rape charge that accounted for one-half of his initial forty-year sentence, and (ii) the trial court "doubled" his first twenty-year sentence on the sodomy charges so as to impose the second forty-year sentence. The

Missouri Court of Appeals rejected this contention, concluding that the presumption of vindictiveness does not apply because Sexton received the same forty-year sentence after both convictions. Relying on a Seventh Circuit decision, *United States v. Shue,* 825 F.2d 1111, 1114 (7th Cir.), *cert. denied,* 484 U.S. 956 (1987), the Missouri court reasoned that, when a multi-count conviction is reversed on appeal, and defendant is convicted or resentenced on one or more of those counts on remand, "the trial judge has the authority to re-evaluate the sentencing package in light of the changed circumstances and resentence the defendant to effectuate the original sentencing intent without violating *Pearce.*" 929 S.W.2d at 914; *accord United States v. Pimienta-Redondo,* 874 F.2d 9 (1st Cir. 1989) (en banc).

This court recently confirmed, in a case involving a one-count conviction, that the *Pearce* presumption of vindictiveness does not apply when the same sentence is imposed following a successful appeal. *United States v. Arrington,* 255 F.3d 637, 639 (8th Cir. 2001). The issue, then, in this multi-count case, is whether the "same sentence" inquiry should be made on a count-by-count basis, or simply by comparing the total prison sentence imposed before and after the successful appeal. A number of our sister circuits have considered this issue in the context of federal prosecutions, where we have supervisory as well as constitutional jurisdiction. Most concluded, as the Missouri Court of Appeals did in this case, that the total sentences should be compared. Two circuits instead compared the total sentence after remand with the total sentence imposed on those same counts before the appeal. *See United States v. Vontsteen,* 950 F.2d 1086, 1092-93 (5th Cir. 1992) (en banc) (collecting cases). Our research uncovered three pre-AEDPA circuit decisions in which state inmates sought federal habeas relief under *Pearce* from their multi-count state court sentences. Relief was denied in all three because the second sentence was not more severe, but the cases were not factually similar to this case. *See*

Washington v. Regan, 510 F.2d 1126 (3d Cir. 1975); *Timmons v. Richards,* 940 F.2d 666, 1991 WL 153443 (7th Cir. 1991) (unpublished); *Thomas v. Sutton,* 857 F.2d 1469, 1988 WL 92922 (4th Cir. 1988) (unpublished). *See also Kelly v. Neubert,* 898 F.2d 15, 18 (3d Cir. 1990) (*Pearce* presumption "should not be mechanically applied when some of a defendant's individual sentences are increased, but his aggregate sentence is reduced on remand following a successful appeal").[3]

Though these prior circuit court decisions do not provide a definitive answer to our issue, they tend to confirm that the Missouri Court of Appeals decision was not an unreasonable application of *Pearce* within the meaning of 28 U.S.C. § 2254(d)(1). In addition, later Supreme Court decisions have not broadly extended the *Pearce* presumption of vindictiveness. *See Alabama v. Smith,* 490 U.S. 794, 801-03 (1989) (no presumption when sentence following trial is more severe than previous sentence following guilty plea; *Pearce* overruled on this issue); *Chaffin v. Stynchcombe,* 412 U.S. 17, 24-29 (1973) (no presumption when more severe sentence imposed by a different jury; *Pearce* is concerned only with judicial vindictiveness, not whether the defendant's right to appeal may be "chilled").

These later Supreme Court decisions, and the circuit court decisions declining to presume vindictiveness when a sentencing judge reimposes the same total sentence in a multi-count case, are strong support for the district court's conclusion that the Missouri courts did not unreasonably apply *Pearce* in this case. *See Williams,* 529 U.S. at 410 ("an

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[3] *But see Midgett v. McClelland,* 547 F.2d 1194 (4th Cir. 1977), cited by the dissent at p. 817 *ante*. In at least two subsequent decisions, the Fourth Circuit has adopted the total sentence or "aggregate package" rule without discussing the divided panel opinion in *Midgett*. *See United States v. Gray,* 852 F.2d 136, 138 (4th Cir. 1988); *United States v. Raimondo,* 721 F.2d 476, 478 (4th Cir. 1983).

unreasonable application of federal law is different from an *incorrect* application of federal law").

We find further support for this conclusion in Missouri law regarding sentencing and the facts of this case. The applicable statute provided that the sentencing court "shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant . . . ." Mo. Rev. Stat. § 557.036.1 (Supp. 1992). In this case, the sentencing court had discretion to impose "any term of years above the minimum, including life imprisonment," because the sodomy statute prescribed a minimum sentence but not a maximum term of years. *State v. Bolds,* 11 S.W.3d 633, 637 (Mo. App. 1999) (citation omitted). *See* Mo. Rev. Stat. § 566.060.2 (Supp. 1990). To determine the appropriate sentence, the sentencing court was required to "take into account the nature and circumstances of the offense together with character and propensities of the offender, as well as his past as it may indicate present purposes and tendencies and suggest the period of restraint and kind of discipline that should be imposed." *State v. Cline,* 452 S.W.2d 190, 195 (Mo. 1970). In reviewing a sentence imposed under this regime, the Missouri appellate courts "presume that the trial court's experience and expertise enable the judge to consider appropriate sentencing factors and to disregard improper matters." *State v. Lindsey,* 996 S.W.2d 577, 579 (Mo. App. 1999).

In this case, a new presentence report was prepared following Sexton's second conviction. At the sentencing hearing, the prosecutor submitted evidence that Sexton had sexually assaulted other young girls in the past, including a conviction for sexually assaulting his prior wife's daughters. The prosecutor urged the trial court to impose the same total punishment, arguing that Sexton was guilty of the same course of prolonged criminal conduct even though the jury had found him not guilty of one specific charge.[4] After defense counsel argued that a forty-year sentence would be "punitive" given Sexton's acquittal of the rape charge, the trial court sentenced him to concurrent forty-year sentences for each sodomy count of conviction. On this record, the Missouri Court of Appeals did not unreasonably apply *Pearce* in concluding that the forty-year sentence is not presumptively vindictive.[5]

B. Was the Evidence Constitutionally Sufficient?

Sexton argues the evidence presented at his second trial was constitutionally insufficient to convict him of the four sodomy charges. To prevail on this due process claim, he must demonstrate that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 324 (1979). In applying this standard, "[t]he scope of our review for a collateral challenge to the sufficiency of the state's evidence is extremely limited. . . . We must presume that the trier of fact resolved all conflicting inferences in the record in favor of the state, and we must defer to that resolution." *Miller v. Leapley,* 34 F.3d 582, 585 (8th Cir. 1994).

Sexton argues the prosecution failed to prove that he engaged in acts of sodomy between September 1, 1990 and February 12, 1991, the dates charged in the information. The Missouri Court of Appeals rejected this contention:

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[4] The prosecutor urged the court to impose concurrent forty-year sentences for the sodomy counts, rather than two consecutive twenty-year sentences, because a new Missouri statute gave state parole authorities power to convert consecutive sentences into concurrent sentences to alleviate prison overcrowding. This aspect of state law refutes any inference that the sodomy sentences were "doubled" out of vindictiveness.

[5] Sexton also argues that his sentence was based upon "sentencing factors" not proved beyond a reasonable doubt, contrary to *Apprendi v. New Jersey,* 530 U.S. 466, 477 (2000). However, *Apprendi* claims may not be raised on collateral review. *United States v. Moss,* 252 F.3d 993, 997 (8th Cir. 2001).

> R.C. testified that the various acts of sodomy occurred continually over a number of years beginning in 1987 when she was 10 years old and continued until she reported them to the police in 1992. The jury could have reasonably concluded, beyond a reasonable doubt, that each of the charged offenses occurred within the time frame provided by the information or prior to the date of the information . . . .

929 S.W.2d at 917. In denying federal habeas relief on this issue, the district court noted that "a fair reading of R.C.'s testimony reveals a reign of sexual impropriety that occurred on a regular basis" and concluded that the trial record fully supports the Missouri Court of Appeals's assessment of the evidence. We agree.

C. The Confrontation Clause Issue.

The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, includes "the right of effective cross-examination." *Davis v. Alaska,* 415 U.S. 308, 318 (1974). Sexton argues this right was violated when the trial court precluded defense counsel from questioning R.C. on recross-examination about sexually explicit magazines her mother found in R.C.'s bedroom. Sexton argues he was prejudiced by the trial court's ruling because cross-examination on this issue would have countered the State's theory that R.C. learned about sexual terms and acts during the course of Sexton's abuse.

The Missouri Court of Appeals rejected this contention for two reasons. First, the Court concluded that the trial court did not abuse its discretion because the issue was beyond the scope of R.C.'s direct, cross, and redirect examination and was collateral to the question whether Sexton had sodomized and raped R.C. Second, the Court concluded that Sexton could not show prejudice because, under Missouri evidentiary principles, the questioner seeking to discredit a witness in this fashion is "concluded by her answers," and R.C. would have testified that Sexton gave her the sexually explicit magazine and forced her to keep it. In addition, the Court noted that Sexton could have placed this evidence before the jury through testimony by R.C.'s mother but failed to do so. 929 S.W.2d at 915-16.

As a general matter, the Confrontation Clause is rarely implicated when a state court limits the scope of cross-examination on an issue that is collateral to the defendant's guilt or innocence. *See Howard v. Sigler,* 454 F.2d 115, 121 (8th Cir. 1972). But even assuming that this ruling violated the Confrontation Clause, we agree with the district court the violation was harmless error. *See Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986) (Confrontation Clause violations are subject to harmless error analysis). As the Missouri Court of Appeals noted, Sexton was not prejudiced by the trial court's ruling because R.C.'s answer to the excluded question would have been unfavorable to Sexton, and the defense could have introduced evidence of the sexually explicit magazine in R.C.'s bedroom through her mother. Moreover, the jury credited R.C.'s testimony that Sexton sodomized her, despite defense efforts to attack her credibility with inconsistent prior statements and the suggestion that she fabricated the alleged abuse to "get back" at her mother and stepfather. In these circumstances, excluding this proffered recross-examination was clearly harmless.

D. Ineffective Assistance of Counsel Issues.

In his pro se briefs, Sexton raises ineffective assistance of counsel issues that require additional procedural background. Following the second conviction, Sexton's trial counsel was appointed to the state court bench. Sexton retained a second attorney to represent him at sentencing. After sentencing Sexton, the trial court initially forgot to advise him of his state post-conviction remedies. This portion of the proceedings took place in chambers a few minutes later, with defense counsel participating by telephone. At the conclusion of the sentencing proceedings, Sexton advised the court that he was satisfied with both attorneys' representation. The court then found no probable cause to believe there had been ineffective assistance of counsel, which cleared the way for Sexton's second counsel to represent him on direct appeal. *See generally* Missouri Supreme Court Rule 29.07(b)(4); *Shigemura v. Groose,* 45 F.3d 250, 252-53 & n.3 (8th Cir.), *cert. denied,* 516 U.S. 855 (1995). One year later, Sexton filed a motion for state post-conviction relief under Missouri Supreme Court Rule 29.15, asserting ineffective assistance of counsel claims. The state courts denied that motion as untimely.

Sexton's federal habeas petition alleged that his first attorney provided ineffective assistance at trial and his second attorney provided ineffective assistance at sentencing and on direct appeal. The district court denied on the merits the ineffective assistance claims relating to the direct appeal; the court denied a certificate of appealability on those issues, and they are not before us. The district court denied as procedurally barred the claims of ineffective assistance by the first attorney at trial, and by the second attorney at sentencing. *See State v. Wheat,* 775 S.W.2d 155, 157-58 (Mo. 1989) (en banc) (ineffective assistance claims not raised in a timely Rule 29.15 motion are forfeited). The court rejected Sexton's contention that cause excused this procedural default but granted a certificate of appealability on those issues.

On appeal, Sexton again argues that cause excuses his untimely motion for state post-conviction relief. In the district court, he argued there was cause because he was not able to speak privately with his attorney when the trial court explained his post-conviction rights, and because the trial court's explanation of Rule 29.15's various filing deadlines confused him into believing he had ninety days rather than thirty days to file a Rule 29.15 motion. The district court rejected these contentions, noting (i) that Sexton did not express a desire to speak privately with counsel and could have done so after the sentencing proceedings; (ii) that the trial court explained that Sexton could file a Rule 29.15 motion himself and would be provided the proper form on request; and (iii) that the trial court's explanation of the Rule 29.15 deadlines could not have caused his procedural default because he did not file a Rule 29.15 motion for one year. Sexton barely alludes to these contentions on appeal. Having carefully reviewed the record, we agree with the district court. *See Fuller v. Bowersox,* 202 F.3d 1053, 1059 (8th Cir.) (trial attorney's failure to advise of applicable state post-conviction deadlines is not cause excusing procedural default), *cert. denied,* 531 U.S. 995 (2000); *Weeks v. Bowersox,* 106 F.3d 248, 250 (8th Cir.) (judge's failure to delineate every feature of state post- conviction relief is not cause), *upheld on en banc review,* 119 F.3d 1342, 1350 n.8 (8th Cir. 1997), *cert. denied,* 522 U.S. 1093 (1998); *Hart v. Purkett,* 95 F.3d 638, 639 (8th Cir. 1996) (judge's minor mistake in explaining Rule 29.15 is not cause).

Sexton makes a different cause argument on appeal, that his second attorney said he would file a timely Rule 29.15 motion, Sexton relied on that representation, and counsel broke his promise because of a conflict of interest—counsel's unwillingness to argue his own ineffectiveness. Sexton first raised this argument in a motion for reconsideration to the district court. The court denied the motion because this was a new attack on the second attorney, because "[t]hese claims of ineffectiveness are so meritless as to fail to qualify as a basis for a conflict of interest," and because there is no constitutional right to effective assistance of counsel in state post- conviction proceedings. The record fully supports this ruling. Therefore, Sexton has failed to demonstrate cause excusing his procedural default in state court, and the district court properly denied his claims of ineffective assistance of counsel at trial and at sentencing.

The judgment of the district court is affirmed.

RICHARD S. ARNOLD, Circuit Judge, dissenting.

The Court concludes that Mr. Sexton did not receive a more severe sentence at his retrial, and, therefore, that *North Carolina v. Pearce,* 395 U.S. 711 (1968), does not apply. I respectfully disagree. Mr. Sexton was convicted of fewer crimes at his second trial. Yet, his sentence was the same as that following his first trial. Quite simply, this is a more severe sentence. To hold otherwise, as the state court did, and as this Court does, is an unreasonable application of *Pearce.* Mr. Sexton's sentence violates due process, and he should be granted relief.

The Supreme Court ruled in *Pearce* "that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U.S. at 725. To enforce this due process guarantee, *Pearce* limits the circumstances in which a sentencing judge may impose a more severe sentence upon a defendant after a new trial. An increased sentence is permissible only when the judge affirmatively states on the record reasons for the more severe sentence that are "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726.

It is uncontested that Mr. Sexton's case does not fall within this exception for later conduct. Nevertheless, the Court holds that *Pearce* does not afford Mr. Sexton any relief. It concludes that because Mr. Sexton's total sentence was the same following both his first and second convictions that he has not been subjected to a more severe sentence. In his original trial, Mr. Sexton was convicted of one count of rape and five counts of sodomy. He was sentenced to five concurrent twenty-year sentences on the sodomy counts and a consecutive twenty-year sentence on the rape count. In his second trial, Mr. Sexton was convicted of five counts of sodomy, but acquitted of rape. Before the judge was a defendant convicted of fewer crimes. Yet, Mr. Sexton received the same total sentence of forty years, handed down as concurrent forty-year terms for each sodomy count. The same person received the same punishment for lesser crimes. This is plainly a "more severe sentence." *Pearce* forbids exactly such a result.

Our sister circuits are split on the application of *Pearce* to multi- count cases. I believe the better approach is that used by the Second and Eleventh Circuits. Rather than comparing the aggregate sentences, these courts compare the first and second sentences only after subtracting from the first sentence any punishment imposed for dropped, dismissed, or acquitted counts. See *United States v. Markus,* 603 F.2d 409 (2d Cir. 1979) (shortening sentence of federal prisoner to correct more severe sentence in violation of *Pearce* that resulted after a count was dropped on retrial). In a case factually similar to Mr. Sexton's, the Eleventh Circuit has held that *Pearce* is violated when a defendant receives an identical sentence after retrial, even though convicted of fewer counts. See *United States v. Monaco,* 702 F.2d 860 (11th Cir. 1983). In that case, a defendant received a total of four years of imprisonment on three counts. He was granted a new trial, at which his motion to have count three dropped for insufficiency of the evidence was granted. He was convicted on the other two counts and sentenced to four years of imprisonment. Although his total first and second sentences were identical, he received a longer sentence on the convicted counts than he had at his first trial. The Eleventh Circuit adopted the approach in *Markus* and held that his new sentence violated the rule in *Pearce.* 702 F.2d at 885. See also *Midgett v. McClelland,* 547 F.2d 1194 (4th Cir. 1977) (granting pre-AEDPA habeas relief to state prisoner who received same sentence at retrial, despite having been acquitted of one charge for which he originally received twenty-year term, as this was impermissible and appeared retaliatory on its face).

Today, the Court instead adopts the "aggregate sentence" approach of simply comparing the first and second sentences. The problems with this approach are manifold. First, it allows a judge to order the same sentence regardless of any reduction in the defendant's convictions, provided that the statutory maximums for the convicted crimes are not exceeded. This results in defendants being given no "credit" for having been convicted of fewer offenses. They receive the same sentence despite fewer convictions. However, under the general sentencing provisions of Missouri, courts are allowed to decide the extent or duration of sentence only "upon a finding of guilt upon verdict or plea." Mo. Rev. Stat. § 557.036.1 (Cum. Supp. 1992). This suggests that in Missouri sentences should relate to offenses, the nature of which determines the punishment. In his second trial, Mr. Sexton was convicted of one less offense. A jury acquitted him of rape. Neither the state nor this Court points to any authority that would allow a Missouri court to consider acquitted conduct in sentencing a defendant. Yet, despite his acquittal on the rape charge that garnered him a twenty-year sentence in the first trial, the court entered the same aggregate sentence against Mr. Sexton following his second trial. It achieved this result by increasing the terms on the sodomy counts to produce the same total term of imprisonment. This appears to be retaliatory on its face.

The mere fact that a sentence of forty years is within the statutory limits allowed by Missouri law, as the Court points out, is irrelevant to a *Pearce* analysis. Upon retrial, Mr. Sexton received a longer sentence for the sodomy convictions, and his total sentence was the same. This is precisely the type of result that chills appeals by criminal defendants, who may believe that the increased sentence after retrial results from judicial vindictiveness. The prophylactic rule in *Pearce* forbidding more severe sentences was designed to remove this doubt. Upholding the same sentence for a defendant who was convicted of fewer crimes does nothing to eliminate this fear. Instead, it informs defendants that whether they are convicted or acquitted of a crime (for which they were originally sentenced to prison time) may now after retrial be irrelevant to their new sentence. Such a result defies the logic of the sentencing statutes of Missouri, in which defendants are given a sentence for each crime of which they are convicted. See generally Mo. Rev. Stat. § 557 (Cum. Supp. 1992).

Second, while the Court may be correct that the Supreme Court has not broadly extended *Pearce,* it is equally true, and much more pertinent here, that *Pearce* is still the law. Its core holding is intact. In both *Alabama v. Smith,* 490 U.S. 794 (1989), and *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973), the Supreme Court articulated reasons why in those situations an increased sentence was unlikely to be the result of judicial vindictiveness. In Mr. Sexton's case, this Court produces no such reasons. Therefore, these cases are inapplicable and do not persuasively support the Court's pinched reading of *Pearce* in the context of a multi-count case.

Indeed, defendants convicted of multiple counts may be more likely to face retaliation upon retrial than defendants convicted twice of a single count. In Mr. Sexton's case, the same judge witnessed a jury convict him of rape and later witnessed a different jury acquit him. A result such as this may seem to a judge to be an unfair "bonus" result of securing a new trial. Or, as in a single count case, a judge may be angry at a defendant for having taken an appeal that forced him to retry the case. These reasons are retaliatory and forbidden by due process.

Of course, a judge could have a benign reason for wishing to alter the sentences for each count in a multi-count context. In the case relied on by the Court, *United States v. Shue,* 825 F.2d 1111, 1114 (7th Cir.), *cert. denied,* 484 U.S. 956 (1987), the Seventh Circuit suggests that because the sentences were likely to have been made "interdependent," a court may wish to recraft the sentence to effectuate its original intent. While this may be true, it does nothing to give assurance against judicial vindictiveness.

Finally, I question the Court's mention of the facts that a new presentence report was prepared for the second sentencing, and that at that hearing, the prosecutor alleged that Mr. Sexton had sexually assaulted other girls in the past. I believe consideration of this information is inappropriate in the context of a *Pearce* analysis. This alleged behavior did not occur *after* the time of the original sentencing proceeding. Therefore, under *Pearce* it cannot be used to support a more severe sentence. Its possible relevance appears to be that it may constitute a non-retaliatory reason for the sentence Mr. Sexton received. While this may be, in fact, why the judge increased the sentences for sodomy (rather than out of retaliation), the judge did not say so, and it is exactly this type of speculation that *Pearce* is designed to eliminate. Our Constitution requires that defendants be freed from any apprehension that the result of a successful appeal may be a vindictive judge. 395 U.S. at 725. Our Court, Mr. Sexton, and other defendants weighing whether to appeal, cannot know why Mr. Sexton received longer sentences for his sodomy crimes. But since there is a reasonable possibility that retaliation for a successful appeal motivated the second sentence, I believe that Mr. Sexton's case falls squarely under *Pearce,* and that his sentence is unconstitutional.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JOHN D. SEXTON,)
)
Petitioner,)
)
v.) Case No. 97-1319-CV-W-3
)
MIKE KEMNA,)
)
Respondent.)

ORDER GRANTING IN PART AND DENYING IN PART CERTIFICATE OF APPEALABILITY

On this date, the Court has denied Petitioner's application for a Writ of Habeas Corpus. In order to appeal to the Court of Appeals, Petitioner must first obtain a Certificate of Appeal ability. 28 U.S.C. § 2253(c)(2) provides that a Certificate of Appealability should be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." "[A] substantial showing that a federal right has been denied . . . requires a showing that the issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Fleiger v. Delo*, 16 F.3d 878, 882-83 (8th Cir.), *cert. denied*, 513 U.S. 946 (1994).[1]

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[1] *Fleiger* was decided before § 2253(c)(3) was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). However, *Fleiger's* standard remains viable. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 808 (1999) ("the pre-Act certificate of probable cause and the post-Act certificate of appeal ability both issue on a substantial showing of the denial of a constitutional right").

The Court has conducted an independent review of the matter and concludes that a Certificate of Appealability should be granted with respect to the following issues, which will be identified by their heading from Part II of the Order.

B(1) Due Process Violation at Resentencing

B(3) Exclusion of Evidence of Pornographic Materials

B(4) Insufficiency of the Evidence

B(9) Ineffective Assistance of Trial Counsel

B(11) Ineffective Assistance of "Second" Counsel

The Court concludes that a Certificate of Appealability should be denied as to the remaining issues. When a Certificate of Appeal ability is denied, the court is required to "state the reasons why such a certificate should not issue." Fed. R. App. P. 22(b). The rationale for the Court's ruling is as follows:

B(2) The Exclusion of Witnesses—This claim raises issues of state law only, and no constitutional protections are implicated.

B(5) Change of Judge—This claim raises issues of state law only, and no constitutional protections are implicated.

B(6) Admission of Hearsay—This claim raises evidentiary issues only, and no constitutional protections are implicated.

B(7) J.S.'s Testimony—This claim was never raised in state court and there is no basis for excusing the procedural default.

B(8) Prosecutorial "Manipulation"—This claim has no support in the record (largely because it was procedurally defaulted).

B(10) Miscellaneous Trial Errors—This claim lacks sufficient specificity to permit meaningful review. Furthermore, the claim was not presented to the state courts and has been procedurally defaulted.

C(1) Ineffective Assistance of Appellate Counsel/Defendant's Failure to Testify—Petitioner's claim that he was "coerced" into surrendering his right to testify by the threat of evidence of uncharged conduct is refuted by the trial court's decision at the beginning of trial to disallow such evidence. Petitioner may have legitimately feared introduction of evidence of prior convictions, but this does not amount to coercion. Finally, Petitioner told trial court that he had made the decision freely, on his own, and without coercion.

C(2) Conflict of Interest, Part One—As a matter of law, the circumstances described by Petitioner do not constitute a conflict of interest.

C(3) Conflict of Interest, Part Two—The failure of appellate counsel to raise arguments regarding his own ineffectiveness at sentencing was caused by Missouri procedural rules, not a conflict of interest.

C(4) Validity of Rule 29.15—Rule 29.15 has withstood every constitutional challenge raised to date, including arguments (like Petitioner's) premised on it strict time limits.

C(5) Ineffective Assistance of Appellate Counsel, Part One—Appellate counsel's decision not to challenge the rejection of two objections to Detective Salva's testimony violated neither the performance nor the prejudice prongs of *Strickland v. Washington*. The first objection was withdrawn, leaving nothing to appeal. The second objection was overruled, but Detective Salva's subsequent testimony revealed his observations; none of the victim's statements were recounted, leaving nothing to appeal.

C(6) Ineffective Assistance of Appellate Counsel, Part Two—The failure to appeal the prosecutor's statements regarding the effect of Mo. Rev. Stat. § 558.0195.5 did not prejudice Petitioner because the misstatement could have had no practical effect on the trial judge's sentencing decision.

For the foregoing reasons a Certificate of Appealability is granted in part and denied in part.

IT IS SO ORDERED.

/s/

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT
COURT

DATE 2/18/00

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOHN D. SEXTON,)
)
Petitioner,)
)
v.) Case No. 97-1319-CV-W-3
)
MIKE KEMNA,)
)
Respondent.)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This case commenced on September 29, 1997, when Petitioner filed his pro se Petition for Writ of Habeas Corpus. On January 14, 1999, the Court denied Respondent's Motion to Dismiss (which was premised on allegations that Petitioners claims were not exhausted) and directed Respondent to respond to the Petition's merits. On March 9, Petitioner sought leave to file an Amended Petition and, before that motion could be addressed, on March 18 Respondent responded to the original petition. The Amended Petitioner describes itself as a supplement to the original Petition, and the parties have apparently treated it as such.

On April 20, the Court granted Petitioner leave to file his amended petition. On May 24, Respondent filed a pleading seeking dismissal of Grounds 1, 2, 3, and 8 of the *Amended* Petition as untimely. Petitioner filed a pro se response on June 25.

On July 29, 1999, counsel entered an appearance for Petitioner and immediately sought an extension of time to file a Traverse. Because of the confusion as to which pleadings were operative and as to the parties' intent in this matter, the Court directed the parties to file a Joint Status Report—which they did on November 19, 1999. In that report, the parties acknowledged the Court's observation that Grounds 4, 5, 7 and 9 of the Amended Petition are the same as Grounds A, E, F and K of the original Petition, and Respondent declared that the discussion of these issues in its original response is equally applicable to those same issues in the Amended Petition. Grounds 1, 2, 3, 6 and 8 of the Amended Petition are covered by the May 24, response. Petitioner desired to file a Traverse that would address (1) Respondent's response to the original Petition and (2) Respondent's Motion to Dismiss the "new" grounds asserted in the Amended Petition. The Traverse was filed on January 24, 2000, making it appropriate to rule on Petitioner's claims.

As stated above, the parties seem to have treated the Amended Petition as a supplement to, as opposed to a replacement for, the original Petition. After accounting for the duplication of claims in the two pleadings, both parties have had an opportunity to address all issues involved in this case. Therefore, all issues will be addressed regardless of whether they are raised in the original or the "supplemental" Petition. The Petition for Writ of Habeas Corpus is denied.

I. BACKGROUND

Petitioner was convicted in January 1994 on one count of rape and five counts of sodomy stemming from a series of incidents involving his stepdaughter, R.C. He was sentenced to twenty years for the rape and twenty years on each of the sodomy counts. The sodomy sentences were to run concurrently with each other and consecutively to the rape sentence, effectively making Petitioners total sentence forty years.

Petitioner's convictions were vacated by the Missouri Court of Appeals because evidence of prior sexual misconduct was admitted in violation of Missouri law. *State v. Sexton*, 890

S.W.2d 389 (Mo. Ct. App. 1995) ("*Sexton I*"). The evidence admitted at the second trial was ably summarized by the Missouri Court of Appeals:

> At the time of trial the victim, R.C., was eighteen years old. When she was approximately nine years old, her mother, Kathleen Sexton, married appellant. Appellant and his young son, Jessie, began living with R.C. and her mother in Lee's Summit, Missouri.
>
> Within five or six months, appellant began subjecting his stepdaughter to a variety of physical and sexual abuse. He ordered her to kiss him on the lips and when she refused, he punched her with his fist in the mouth. When she still refused, he punched her in the nose and she finally acquiesced and kissed him on the lips.
>
> Shortly after the abuse began, appellant removed all of her clothes, put her in a big yellow shirt, took her downstairs to the kitchen and turned on the garbage disposal. He placed her hand over the disposal and warned her that he would put her down there if she told anyone. He also told her that if she ever tried to leave or if she ever told on him that he would kill her.
>
> When she was ten years old, a few months after he had forced her to kiss him on the lips, appellant placed his penis in her mouth and forced her to suck it. He would usually make her swallow the "white stuff" that came out of his penis when he ejaculated. He forced her to perform oral sex between three and four times a week. The incidents normally occurred in the morning when her mother was at work.
>
> R.C. testified that over the period of time she lived with appellant, he placed his penis in her vagina, touched her vagina with his fingers and tongue, touched her breasts with his fingers and his mouth, and her "bottom" with his penis and his hands. She testified that she remembered on one

> occasion when she was ten or eleven, appellant bent her over the coffee table and pulled her pants down. He then inserted his penis into her rectum causing her bottom to bleed. On numerous other occasions appellant placed his penis in her vagina. These incidents of penile-genital conduct occurred in the bedroom at the family's home and in the family's trailer at Truman Lake.
>
> At some point, appellant and her mother placed R.C. on birth control pills against her will. She was told that it was a precautionary measure to prevent against pregnancy in case somebody raped her because appellant didn't want her to get pregnant.
>
> Appellant also used oral sex as a disciplinary tool and control mechanism. R.C. was given the choice between being whipped on the bare buttocks with a thick belt or performing oral sex whenever she needed to be punished. She normally chose the whippings which left marks and bruises on her arms, chest, legs and knees.
>
> R.C. described an incident where appellant grabbed her by the hair and threw her down the stairs. She testified that he would hit her with his fists and throw various objects at her including tools, pencils, pillows, shoes and other items. Appellant would also force her to do something sexually if she wanted to socialize with her friends.
>
> On November 10, 1992, following an incident of sexual abuse at Truman Lake, R.C. reported the abuse to the Lee's Summit police. She was removed from the home and placed in foster care temporarily before going to reside with her biological father.

State v. Sexton, 929 S.W.2d 909, 912-13 (Mo. Ct. App. 1996) ("*Sexton II*"). On remand, Petitioner was convicted on five counts of sodomy but was acquitted of rape. This time, he was sentenced to forty years on each sodomy count with the sentences to run concurrently, effectively making Petitioner's total sentence forty years. Petitioner appealed and, in the course of perfecting his appeal, filed the transcript on appeal on December 18, 1995. On August 16, 1996, the Missouri Court of Appeals reversed one of the sodomy counts but affirmed the remaining convictions and sentence. On December 27, 1996, Petitioner filed a pro se motion for postconviction relief pursuant to Missouri Rule 29.15. The Motion was denied as untimely, and the denial was affirmed on appeal. *Sexton v. State*, 954 S.W.2d 664 (Mo. Ct. App. 1997).[1]

Additional facts about the case will be discussed as they become relevant to the issues that Petitioner has raised.

I. DISCUSSION

A. Standard/Need for a Hearing

The Antiterrorism and Effective Death Penalty Act ("AEDPA") amended 28 U.S.C. § 2254 by, *inter alia,* changing the provisions governing the standard of review. Generally speaking, section 2254 previously provided for deference to factual findings made by state courts and for *de novo* review of state courts' conclusions of law. Following AEDPA, the operative portions of section 2254 state as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

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[1] The Missouri Court of Appeals' rationale for affirming is set forth in its unpublished memorandum, which appears as Respondent's Exhibit F.

> established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, then, this Court's role in reviewing factual determinations is virtually the same as it was under prior law. The critical question is: how are questions of law to be reviewed? Recognizing that distinguishing between "a decision that is contrary to" and "an unreasonable application of" Supreme Court precedent is no easy task, Courts of Appeal around the country are split on the issue. The Eighth Circuit addressed the issue in *Long v. Humphry*, 184 F.3d 758, 760-61 (8th Cir. 1999) (adopting Third Circuit's approach as set forth in *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir.) (en banc), *cert. denied*, 120 S. Ct. 73 (1999)). The Supreme Court will consider the issue this term. *See Williams v. Taylor*, 119 S. Ct. 1355 (1999) (order granting writ of certiorari).

Petitioner has presented some compelling arguments on the matter, but the Court discerns no need to delve into the matter. Obviously, there is no way to tell whether *Long* will ultimately remain good law on the matter until after the Supreme Court decides *Williams*. More importantly for present purposes, the Court concludes that this case can be resolved without conclusively determining the correct view of AEDPA. Even if the state courts' conclusions and application of federal law are reviewed de novo, Petitioner cannot prevail.

The Court also discerns no need for an evidentiary hearing in this case. "[A] habeas petitioner is entitled to an evidentiary hearing in federal court if the petition alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." *Toney v. Gammon*, 79 F.3d 693, 697 (8th Cir. 1996). However, a hearing is not required with respect to those claims that are procedurally defaulted or that are clearly without merit. *E.g., Zeitvogel v. Delo*, 84 F.3d 276, 281-82 (8th Cir.), *cert. denied*, 117 S. Ct. 368 (1996); *Toney*, 79 F.3d at 697; *Wilson v. Kemna*, 12 F.3d 145, 146 (8th Cir. 1994). Most of Petitioner's claims either were defaulted or were the subject of a full and fair evidentiary hearing. The few claims that do not fall into these categories (specifically, certain claims of ineffective assistance of appellate counsel) do not turn on the resolution of disputed facts and can be resolved on the basis of the undisputed facts already present in the record. Accordingly, there is no need for a hearing in this case.

B. Issues in Original Petition

1. Due Process Violation at Resentencing

Petitioner's first point contends that his Due Process rights were violated when the trial court effectively sentenced him to forty years. The alleged infirmity arises because this is the same effective sentence handed down after the first trial, but at the second trial Petitioner was acquitted of rape. In other words, Petitioner was sentenced to forty years for rape and sodomy, then on retrial was sentenced to forty years even though he was guilty only of sodomy. Petitioner reasons that the decision to mete out the same sentence violates the Due Process clause.[2]

Although the claim is one premised on Due Process, Petitioner has cited a variety of cases and presented a variety of arguments premised on related arguments involving Double Jeopardy. The Court deems this to be inappropriate; although the issues are related, the only one that has been raised in the state courts is Due Process. Therefore, the Court will confine itself to the Due Process parameters of this issue.

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[2] On direct appeal Petitioner argued that "his sentences on retrial have the effect of being more severe than his original sentences due to the enactment" of certain statutory provisions in between his two trials. *State v. Sexton*, 929 S.W.2d 909, 914 (Mo. Ct. App. 1996). The Missouri Court of Appeals rejected the point, holding that the statute did not apply to Petitioner. The point has not been asserted in these proceedings, so there is no need for this Court to consider it.

The Due Process concerns involve a situation in which a defendant has obtained a reversal of his conviction, is retried, and is sentenced to a greater sentence than he originally received.

> Due Process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (footnote omitted). However, "[i]t is important that the Pearce principle not be blown out of proportion. Pearce does not flatly prohibit resentencing or even enhancement of sentence, after the accused has taken an appeal or otherwise taken advantage of some legal right." *United States v. Pimienta-Redondo*, 874 F.2d 9, 12 (1st Cir.) (en banc), *cert. denied*, 493 U.S. 890 (1989). The presumption of vindictiveness does not exist where, for instance, the greater sentence is imposed by a jury uninvolved in (and unaware of) the prior, more lenient sentence, *Chaffin v. Stynchcombe*, 412 U.S. 17, 24-29 (1973), when the sentence imposed after trial is greater than that imposed as a consequence of a plea, *Alabama v. Smith*, 490 U.S. 794, 801-02 (1989), or more or different information is available at the time of the second sentencing. *Pearce*, 395 U.S. at 726; *see also Texas v. McCullough*, 475 U.S. 134, 142-44 (1986). At all times, the focus is not whether a greater sentence was imposed, but rather whether it was imposed in circumstances in which there is a reasonable likelihood that the greater sentence was the product of vindictiveness. *Smith*, 490 U.S. at 799-800.

Petitioner was not given a greater sentence following his successful appeal; he was given an identical sentence. The real question is whether the trial court was obligated to "discount" the sentence to account for the changed circumstance of Petitioner's acquittal following the second trial. The Court holds that neither the Due Process Clause generally nor *Pearce* specifically requires this result.

> When a defendant is convicted of more than one count of a multicount indictment, the district court is likely to fashion a sentencing package in which sentences on individual counts are interdependent. When, on appeal, on or more counts of a multicount conviction are reversed and one or more counts are affirmed, the result is an "unbundled" sentencing package.

United States v. Shue, 825 F.2d 1111, 1114 (7th Cir.), *cert. denied*, 484 U.S. 956 (1987).[3] In such a situation, "the reversal of convictions underlying some, but not all, of the sentences renders the sentencing package ineffective in carrying out the district court's sentencing intent as to any one of the sentences on the affirmed convictions." *Id.*

> The offenses charged establish a permissible range of punishment and the court then designs the ultimate sentencing plan by considering the accused's actual conduct during the criminal enterprise, as well as his life, health, habits, and background. The myriad of other factors underlying the original sentence in a multiple count case are

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[3] Although this discussion appears in the context of discussion of double jeopardy rights, the Seventh Circuit made clear that the discussion applies equally to the Due Process issue when it said "as we shall discuss in the following paragraphs, there can be no question that such resentencing does not violate the double jeopardy clause or the due process clause." 825 F.2d at 1114.

> not necessarily altered when a defendant successfully appeals his conviction on one count. After an appellate court unwraps the package and removes one or more charges from its confines, the sentencing judge, herself, is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate). Seen in the light of these realities, retrofitting a sentence after a conviction is sustained in party and vacated in part seems altogether a sensible, fully legitimate response to criminal conduct.

Pimienta-Redondo, 874 F.2d at 14. When a defendant receives the same sentence after reversing some but not all of the counts of conviction, the sentencing court is presumed to be effectuating its original sentencing intent and no presumption of vindictiveness arises. The lack of a presumption of vindictiveness demonstrates the lack of a Due Process violation. *Pimienta-Redondo*, 874 F.2d at 14-16; *Shue*, 825 F.2d at 1115-16.

Petitioner asserts a critical difference is present in that he was acquitted of rape. The Court sees no such difference. In *Shue*, the defendant's conviction on Count IV was affirmed, and his convictions on Counts I, II, and III were vacated and remanded for new trial. 825 F.2d at 1112. Although the defendant was not retried on those counts, his situation was virtually identical to Petitioner's. It is true that Shue was never formally acquitted, but this distinction does not appear to be of importance in any case construing *Pearce*. *Pimienta-Redondo* involved a situation even closer to the present one: there, the First Circuit had previously held that the defendants could be found guilty of violating either 21 U.S.C. § 955a(a) *or* 21 U.S.C. § 955a(c), but not both. 874 F.2d at 11-12. The 955a(a) counts were reversed outright, which is tantamount to an acquittal.

Finally, Petitioner's arguments overlook the rationale behind *Shue* and *Pimienta-Redondo*. As the quote from the latter case (appearing on page 6 *supra*) demonstrates, the rule is premised on the understanding that the sentencing judge considers a wide variety of factors in fashioning a sentencing, including *inter alia* the nature of the conduct in question and the defendant's prior criminal history.[4] It was perfectly proper for the sentencing court to determine that Petitioner's actions, history, etc.—regardless of the crimes with which he was convicted—justified a sentence of forty years. The sentencing court was not constitutionally obligated to alter that conclusion in this case.

2. The Exclusion of Witnesses

R.C. remained in the courtroom after she testified in the prosecution's case in chief. The prosecution attempted to call her to testify in rebuttal, whereupon Petitioner's counsel objected. The objection was overruled for the following reasons:

> THE COURT: I'll overrule the objections. First of all, I don't know if the rule was invoked but even if it were, this is rebuttal, and the reason for the rule, of course, is to keep folks from falsifying testimony and if all she's going to say is no, she didn't [have contact with certain relatives], I don't see how her having been in the courtroom would affect her response to that, anyhow, so I'll overrule the objection.

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[4] Indeed, crediting Petitioner's argument would make it improper for a sentencing judge to consider conduct that formed the basis upon which the defendant was acquitted. Of course the exact opposite is true. *E.g., Edwards v. United States*, 118 S. Ct. 1475, 1477 (1998).

Tr. at 288. The Missouri Court of Appeals found that "the witness exclusionary rule was never invoked." *Sexton II*, 929 S.W.2d at 914. However, the record reflects that the rule was invoked at the prosecution's request. Tr. at 33. Nonetheless, Petitioner is not entitled to relief.

The Missouri Court of Appeals also upheld the trial court's conclusion that the rule did not require prohibiting R.C.'s rebuttal testimony. *Sexton II*, 929 S.W.2d at 914-15. Although Petitioner addresses the point in a rather condescending manner, Traverse at 27, the Court deems it dispositive that the alleged error implicates state procedural rules and does not implicate any constitutional guarantees. Absent some constitutional right, a mistake in interpreting or applying state law does not entitle a defendant to habeas relief. *E.g., Martin v. Norris*, 82 F.3d 211, 217 (8th Cir. 1996). Even if state law is violated (a point that will not be decided in this forum), habeas relief is not appropriate. *Jenner v. Class*, 79 F.3d 736, 740 (8th Cir.), *cert. denied*, 519 U.S. 874 (1996). Missouri's rule may be similar to Rule 615 of the Federal Rules of Evidence, but (1) there is nothing compelling Missouri to apply it in the same way as would a federal court, and (2) it is not based on the Constitution. This claim raises issues of state law and is not cognizable in this proceeding.

3. Exclusion of Evidence of Pornographic Materials

The factual underpinnings of this claim were summarized by the Missouri Court of Appeals:

> [A]ppellant attempted to question R.C. on recross-examination as to pornographic material found by her mother in R.C.'s bedroom under the bed. Defense counsel stated on the record that "the evidence will be that upon her departure from the home, pornographic books were found in her room by her parents . . . they're trying to portray her as naive and virginal. This evidence is designed to counter that." The court sustained prosecution's objection on

relevancy and admissibility. Defense made the following offer of proof:

> Q: [R.C.], before you went to the police, you had looked at and seen literature that was sexually explicit, hadn't you?
>
> A: Yes.
>
> Q: And you, as a matter of fact, had literature that was sexually explicit in your bedroom, didn't you?
>
> A: Not willingly.
>
> . . .
>
> Q: Tell us what you had in your bedroom unwillingly that was sexually explicit?
>
> A: It was a magazine that he had found in this duplex that they were cleaning and he told me to keep it.
>
> . . .
>
> Q: What did you do with it?
>
> A: Put it underneath my bed.
>
> Q: Never looked at it?
>
> A: No.

929 S.W.2d at 915. The references to "he" were references to Petitioner. Tr. at 123. The Missouri Court of Appeals affirmed the exclusion of this evidence because it was not relevant, because it was beyond the scope of direct examination, and was collateral to the issues in the case. The court also observed that the answer would not have been particularly helpful to Petitioner in discrediting R.C., given that she identified Petitioner as the source for the material. 929 S.W.2d at 915-16.

Respondent contends that this claim is not cognizable because it is alleges evidentiary error, not constitutional error. This characterization is incorrect. On appeal and in this proceeding, Petitioner argued that his constitutional right to cross-examine witnesses has been denied. The Missouri Court of Appeals did not address the constitutional dimensions of the issue, leaving it to this Court do so.

The right to conduct cross-examination is a component of the rights guaranteed by the Confrontation Clause. "The Confrontation Clause does not prevent a trial judge from placing limits on cross-examination, and trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on interrogation that is harassing, repetitive or only marginally relevant." *Harrington v. State of Iowa*, 109 F.3d 1275, 1278 (8th Cir. 1997). The Court believes that this latitude extends to include limiting the scope of recross examination to the well-established bounds of matters that were addressed in direct and cross examination. Moreover, the relevance is doubtful given the stated purpose for the questioning. As explained by Petitioner's trial counsel, the prosecutor was "trying to portray [R.C.] as naive and virginal. This evidence is designed to counter that." Tr. at 119; *see also* Traverse at 29 ("[T]he evidence was offered to show that [R.C.] had a basis for knowing about the acts of which she complained other than the possibility that [Petititioner] had inflicted them on her."). Assuming the materials depicted the sexual (and other) acts R.C. testified about during her direct testimony (a fact that cannot be gleaned from the record), it would not aid Petitioner's cause to prove that R.C.'s prior basis for knowledge of sexual matters came from magazines he provided her. Similarly, the evidence's failure to show a source of knowledge external to Petitioner suggests that any error in excluding the evidence constituted (at worst) harmless error. *Cf. Harrington*, 109 F.3d at 1279 ("Even assuming, arguendo, that the above rulings constituted constitutional error, habeas relief is not automatic, for a violation of the Confrontation Clause can constitute harmless error.").

4. Insufficiency of the Evidence

The Amended Information charged that Petitioner committed various acts of sodomy on R.C. between September 1, 1990 and February 12, 1991. Legal File at 2-4. Petitioner contends there was insufficient evidence to prove that he committed sodomy between those dates and supports his argument by focusing on evidence that he committed sodomy before and after the dates specified in the Amended Information. The Missouri Court of Appeals properly examined the record as a whole in rejecting Petitioner's argument:

> Here, the earliest act of sodomy took place in 1987 or early 1988 when R.C. was ten years old and first forced to perform oral sex on appellant. The amended information and the instructions provided the time period involved as between September 1, 1990, through February 12, 1991. R.C. testified that the various acts of sodomy occurred continually over a number of years beginning in 1987 when she was 10 years old and continued until she reported them to the police in 1992. The jury could have reasonably concluded, beyond a reasonable doubt, that each of the charged offenses occurred within the time frame provided by the information . . . .

Sexton II, 909 S.W.2d at 917.[5]

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[5] The court also indicated that, under state law, "the state is not confined in its evidence to the precise date stated in the information, but may prove the offense to have been committed any date prior to the date of the information and within the period of limitation." *Sexton II*, 929 S.W.2d at 917. There is no doubt that this is true if the defendant is charged with having committed an offense "on or about" a certain date. *See, e.g.*, *United States v. Turner*, 189 F.3d 712, 722 (8th Cir. 1999); *United States v. Duke*, 940 F.2d 1113, 1119-20 (8th Cir. 1991). Here, however, the "on or about" language does not appear in the Amended Information. The point is not particularly important given that the jury was specifically told that it had to find, beyond a reasonable doubt, that Petitioner committed the

Review of this argument is limited to determining "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Miller v. Leapley*, 34 F.3d 582, 585 (8th Cir. 1994) (quotation omitted). The fact that Petitioner committed sodomy before and after the dates alleged in the Amended Information does not mean there was insufficient evidence to prove that he committed sodomy between those dates. The record confirms the court of appeals' assessment of the evidence. *E.g.*, Tr. at 65-69; 72; 77-78; 97-98.[6] Furthermore, a fair reading of R.C.'s testimony reveals a reign of sexual impropriety that occurred on a regular basis, starting from the time her mother married Petitioner and ending when she reported his conduct—a period of time that included the time frame alleged in the Amended Information. Viewed in the light most favorable to the jury's verdicts, there was sufficient evidence to support the convictions.

5. Change of Judge

After the case was remanded for retrial following the decision in *Sexton I*, Petitioner sought a change of judge. Petitioner did not allege that the trial judge was biased,[7] but instead relied upon a state rule permitting a criminal defendant the right to obtain a change of judge. The Missouri Court of Appeals ruled that Petitioner's request was untimely under

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acts of sodomy between September 1, 1990 through February 12, 1991. Legal File at 35-44 (jury instructions on Counts II through VI).

[6] At times, R.C. dated events by referencing her age at the time. For clarification, the reader is advised that R.C. was born in February 1977. Tr. at 49.

[7] This is not meant to suggest that a claim of bias would have been premised on constitutional protections. *See Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-22 (1986).

that rule. *Sexton II*, 929 S.W.2d at 917-18. Petitioner contends the court of appeals was wrong in its interpretation and application of the rule, but as stated elsewhere in this Order a federal court cannot substitute its interpretation of state law for that expressed by a state court. Moreover, errors of state law are not constitutional matters. Relief on this point is denied.

6. Admission of Hearsay

Petitioner contends that evidence from Detective Chris Salva regarding information R.C. provided him constituted hearsay. During the course of Detective Salva's testimony, an objection was made—but the objection contended that the testimony was improper bolstering of R.C.'s testimony. Hearsay was not mentioned. Tr. at 187-89; 193-96. This issue was raised in the Motion for New Trial; Detective Salva's testimony was addressed in Point Four and described as both hearsay and improper bolstering. Legal File at 57-58. Neither point was raised on appeal.

Respondent contends that the point should be rejected because it was procedurally defaulted when the issue was not raised on appeal. Petitioner argues that cause and prejudice exists to excuse the default in failing to raise the point on appeal (although he offers no excuse for the failure to raise the hearsay objection at trial). The Court tends to agree with Respondent that the issue has been defaulted; however, rather than delve into this matter the Court will reject Petitioner's claim because the error he complains of is evidentiary and not constitutional in nature. *E.g., Clark v. Groose*, 16 F.3d 960, 963 (8th Cir.), *cert. denied*, 513 U.S. 834 (1994).

7. J.S.'s Testimony

J.S. was R.C.'s younger[8] stepbrother. Tr. at 153. Petitioner contends that the trial court erred in letting J.S. testify because J.S.'s mother was coaching him. No objection was made at trial, and the point was not raised either in the Motion for New Trial or on appeal. Respondent intimates that "abandonment of counsel at sentencing, and on appeal, prevented him from properly preserving" this issue. Traverse at 35. Setting aside the question of whether Petitioner was abandoned, the Court observes that the point was lost during trial when no objection was made. Once the trial was over, it was too late to make a record or otherwise preserve the issue. This claim has been procedurally defaulted.

8. Prosecutorial "Manipulation"

Petitioner baldly asserts that the prosecutor manipulated the timing of trial. Although the point is not particularly clear, it appears that Petitioner is claiming that the prosecutor purposely mislead the trial court and Petitioner's trial counsel as to the length of the prosecution's case, thereby impairing trial counsel's ability to prepare for trial and arrange for witnesses to be present. The record provides absolutely no support for this claim, and no support is identified by Petitioner.

9. Ineffective Assistance of Trial Counsel

Petitioner raises a variety of claims of ineffective assistance of trial counsel. Petitioner candidly concedes that the claims were not raised in a timely-filed 29.15 motion. This procedural default precludes consideration in this proceeding. *E.g., Shigemura v. Groose*, 45 F.3d 250, 251-52 (8th Cir.), *cert. denied*, 516 U.S. 555 (1995).

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[8] J.S. was born in April 1982. Tr. at 153.

Petitioner suggests that there is cause and prejudice sufficient to excuse this default. Due to human inadvertence, the sentencing proceedings were concluded before the trial court advised Petitioner of his rights under Rule 29.15. By the time the error was noted Petitioner's counsel had left the courthouse. The trial court conducted supplemental proceedings in Petitioner's presence and his attorney participated by phone. Tr. at 349. The trial judge summarized the purposes of a Rule 29.15 motion and then declared as follows:

> [I]f a motion is filed under this Rule 29.15 and an appeal is pending from the judgment of conviction that is the subject of the motion appeal, [the appeal] shall be suspended until final determination of issues raised by the motion. Appellant shall give notice to the Court where the appeal is pending of the entry of judgment on the motion filed under this Rule 29.15 within ten days of the entry of the judgment. If an appeal is filed from the judgment sustaining or overruling a motion filed under the provisions of this Rule 29.15, the appeal from the judgment of conviction shall be consolidated with the appeal from the judgment on the motion.
>
> The record on appeal shall consist of the transcript and legal file from both the judgment or conviction and the judgment on the motion. If a claim of ineffective assistance of counsel was presented in the motion, the attorney representing movant on the motion filed pursuant to this rule shall be the attorney on appeal for the consolidated case. In other words, the deal is, *if you don't file the appeal you've got to file this within 90 days after you get to the penitentiary. If you do file an appeal, it's like I just read. It's different if you file an appeal than if you don't.*

Tr. at 350-51 (emphasis added).

Petitioner identifies a variety of infirmities in these events that he contends constitute cause and prejudice. First, he contends that he "was completely unable to consult with his lawyer privately during the Rule 29.15 advice-of-rights hearing. He was unable to ask counsel what needed to be done, what the filing deadlines were, what allegations were permitted under the rule, and whether he would be able to file this paperwork himself, or expect [counsel] to do it." Traverse at 42. The Court does not find these arguments compelling. Petitioner never indicated a desire to talk privately with his attorney, so it is not proper to infer that he was denied the opportunity to do so. He had the opportunity to speak with him privately at a later time. The trial court specifically told Petitioner that he could file the paperwork himself and that a form for doing so would be provided to him if he asked. Petitioner indicated his satisfaction with the representation he received from both of his attorneys and gave no indication that he desired to file a postconviction motion or that he desired more information on the topic. Tr. at 352-53. *Cf. Hart v. Purkett*, 95 F.3d 638, 639 (8th Cir. 1996) (per curiam) ("[N]othing in the record suggests that Hart contemplated pursuing any remedy other than a direct appeal during the period in which a timely Rule 29.15 petition could have been filed."). Finally, the Eighth Circuit recently held that a lawyer has no duty to provide information about relevant postconviction deadlines. *Fuller v. Bowersox*, No. 98-3901, slip op. at 11-12 (8th Cir. Feb. 3, 2000). Consequently, Petitioner was not constitutionally entitled to expect his attorney to provide information, so the fact that he did not do so at the time of sentencing does not provide cause or prejudice. The Court holds that the fact that Petitioner's attorney participated in this small aspect of the proceedings by phone constitutes neither cause nor prejudice sufficient to excuse his failure to seek postconviction relief.

Petitioner also contends that the trial court misstated the deadlines for filing a Rule 29.15 Motion. Focusing on the italicized passage of the quote on page 15 *supra*, Petitioner contends that the trial judge misstated the time limits because a Rule 29.15 motion must be filed within thirty days of the filing of the transcript on appeal. The Court agrees that there was an ambiguity in the judge's statement, but it is not the ambiguity complained of and it is not sufficiently severe to qualify as cause and prejudice.

The trial judge was clearly trying to explain the time limits that applied in two situations: (1) in the event a direct appeal was perfected, and (2) in the event a direct appeal was not perfected. According to the 1995 version of the Missouri Rules (the version then in effect), "[i]f an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal . . . ." Rule 29.15(b). The very next sentence applies when no direct appeal is taken: "[i]f no appeal of such judgment was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections." Petitioner contends that the trial judge was describing the limits in the 1996 version of the rules (where the deadline was changed to ninety days regardless of whether the defendant perfected a direct appeal), but the trial judge's words belie this contention. The judge said "*if you don't file an appeal* you've got to file this within 90 days after you get to the penitentiary. *If you do file an appeal,* it's like I just read. *It's different if you file an appeal than if you don't.*" Tr. at 351. The judge accurately described the time limit for filing a 29.15 motion in the event no appeal was perfected.

The true infirmity (which Petitioner has not specifically identified) is that the judge did not identify the deadline for filing a 29.15 Motion when a direct appeal had been perfected. Although the judge identified the two situations outlined above and identified the deadline when there was no direct appeal, he never identified the deadline when a direct appeal was taken. The judge's statements did not confuse Petitioner into believing he had ninety days to file a 29.15 Motion, as demonstrated by the fact that he did not file his 29.15 Motion until December 27, 1996—more than a year after he was sentenced. Moreover, the Eighth Circuit has held that the failure to specify every feature of a postconviction proceeding does not constitute cause and prejudice. *Weeks v. Bowersox*, 106 F.3d 248, 250 (8th Cir. 1997)[9] (failure to specify time limits for filing postconviction proceeding is not cause and prejudice); *see also Hart*, 95 F.3d at 639 ("relatively minor mistake" in explaining requirements is not cause and prejudice).

There being no cause and prejudice to excuse Petitioner's failure to file a timely 29.15 Motion, his claim of ineffective assistance of trial counsel has been procedurally defaulted.

10. Miscellaneous Trial Errors

Petitioner's claim is difficult to understand; the best course is to simply quote the claim as it appears in Petitioner's original pro se Petition:

> The trial court erred in [not] giving the defendant a fair trial. (a) Where as [sic] the judge ask[ed] . . . that the trial . . . not take more than three days. (b) The judge was prejudice[d] from [the] first trial. (c) Activit[ies] that went on in the courtroom. (d) Prosecutors['] manipulation of the defendant['] witnesses['] words and the state[']s witnesses counterdicting [sic] each other.

No corresponding objection was raised at trial or on appeal. Petitioner offers an explanation intended to excuse the default on appeal, but there is no excuse for failing to raise the issues in the trial court. Specifically, Petitioner does not (1) identify any record support for his contention that the trial court limited the length of trial in a manner that precluded him from presenting a defense, (2) present any basis for concluding the judge was biased, (3) specify the "activities" that he s complaining about, or (4) explain the "manipulation" of witnesses. The point is rejected.

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[9] The panel's opinion in *Weeks* was vacated when the case was heard en banc. However, the en banc court specifically adopted the panel's discussion of cause and prejudice and focused its discussion on the issue of actual innocence. *Weeks v. Bowersox*, 119 F.3d 1342, 1350 n.8 (8th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1093 (1998).

11. Ineffective Assistance of "Second" Counsel

After trial but before Petitioner was sentenced, Petitioner's trial counsel was appointed to the state bench. Petitioner retained a new attorney to represent him at sentencing and on appeal. In this point, Petitioner contends that his second attorney was constitutionally ineffective in both proceedings.

With respect to the sentencing hearing, Petitioner contends that the second attorney, unlike the first, did not call witnesses. He also complains about the admission of "letters" from victims of Petitioner's prior crimes. With respect to the latter point, the record reveals that counsel objected to their admission, but was overruled. Tr. at 337-39. There is no suggestion as to what more counsel should have done after the objection was overruled. In any event, any alleged ineffectiveness at sentencing should have been raised in a postconviction proceeding, but was not. The claim has been procedurally defaulted.

Petitioner once again asserts that there is cause and prejudice to excuse his failure to file a timely 29.15 Motion. For the reasons expressed in Part II(B)(9), *supra*, the Court holds that there is no cause and prejudice sufficient to excuse the default.

In this point Petitioner also contends that his attorney was ineffective because he "forfeited" the oral argument on appeal and allowed an associate to conduct the argument.[10] A claim of ineffective assistance of counsel is analyzed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "This standard requires [Petitioner] to show that his trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense." *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995), *cert. denied*, 517 U.S. 1214 (1996) (quoting *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992)). This analysis contains two components: a performance prong and a prejudice prong.

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[10] Respondent contends that the summary denial of Petitioner's Motions to Recall the Mandate are merits decisions to which deference is due, and supports his position by citing *Nave v. Delo*, 62 F.3d 1024, 1031-32 (8th

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. *Id.* at 689. Assuming the performance was deficient, the prejudice prong "requires proof 'that there is a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different.'" *Lawrence*, 961 F.2d at 115 (quoting *Strickland*, 466 U.S. at 694).

Id. Failure to satisfy both prongs is fatal to the claim. *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997) (no need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness"). The fact that one attorney conducted oral argument instead of another will not constitute prejudice, particularly when (as is

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Cir. 1995). *See* March 18, 1999 Response to Court Order at 6. Nothing on those pages supports this proposition. Moreover, the Court does not agree that deference is due. However AEDPA's standard is ultimately interpreted by the Supreme Court (*see* discussion in Part II.A, *supra*), a federal court is still called upon to consider the reasons for the state court's decision. Absent a rationale, there is no basis for deferral.

the case here) there is no allegation that the attorney who conducted the argument violated *Strickland's* standards.

C. *Issues in Supplemental Petition*

As stated earlier, all of the claims in the Supplemental Petition either (1) duplicated claims made in the original Petition or (2) were the subject of Respondent's Motion to Dismiss. The Motion to Dismiss is denied.

Respondent's argument is predicated on 28 U.S.C. § 2244(d), which requires that a petition for writ of habeas corpus be filed within one year of the conclusion of the direct appeal.[11] The Missouri Supreme Court denied transfer on October 1, 1996, and Petitioner did not seek a Writ of Certiorari from the United States Supreme Court. Rule 13 of the Rules of The Supreme Court provided Petitioner with ninety days to seek a writ of certiorari—or, until December 30, 1996. *See* Supreme Court Rule 13.1. Thus, the one year limitation started on December 31, 1996. *See Nichols v. Bowersox*, 172 F.3d 1068, 1072 (8th Cir. 1999) (limitation period starts after time for seeking certiorari expires). This case was initiated on September 29, 1997—well within one year.

The arguments targeted by Respondent's motion were raised in a supplement to the petition filed outside the time period, this does not alter the Court's analysis. There is no suggestion that section 2244(d)'s time limits apply on a claim-by-claim basis, and such a holding would be contrary to the manner in which statutes of limitation are typically applied. The relevant inquiry is: when was the action commenced? The answer to this inquiry reveals that the action was timely filed.

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[11] Section 2244(d) actually requires the petition to be filed within one year of the latest of four different events; conclusion of direct appeal is the event applicable to this case.

Having denied Respondent's Motion to Dismiss the Supplemental Petition, the Court will address the merits. The Court's discussion will be limited to those claims unique to the Supplemental Petition; claims that merely repeat claims asserted in the original Petition will not be rehashed.

1. Ineffective Assistance of Appellate Counsel/Defendant's Failure to Testify

Petitioner contends that his trial attorney "compelled" him into surrendering his right to testify "due to the threat of the introduction of evidence of other allegations of uncharged crimes." Supplemental Petition at 3. He apparently believes his appellate counsel should have raised the point on appeal. The record refutes the factual underpinnings of Petitioner's claim in a variety of aspects. First, the trial court sustained a Motion in Limine to exclude evidence of prior uncharged conduct. Tr. at 2-22. Petitioner was previously convicted of a felony, and the prior conviction was admissible if Petitioner testified; this fact was considered by Petitioner when he decided not to testify. Tr. at 284-85. Petitioner represented to the trial court that he had made the decision not to testify after consulting with his attorney, with friends and with family, Tr. at 283, that the decision had been made by him and not by anyone else, Tr. at 284, and that his lawyer did not force the decision upon him. Tr. at 285.

The "threat" of evidence of uncharged conduct could not have played a part in Petitioner's decision because there was no threat. Evidence of prior convictions may have dissuaded Petitioner from testifying, but a trial counsel is not ineffective for pointing this possibility out to a defendant or for counseling that the defendant not take the stand because of the potential for impeachment. Petitioner's own testimony belies his claim of "attorney coercion." This claim fails on the merits.

2. Conflict of Interest, Part One

In an argument related to the "cause and prejudice" arguments discussed in Part II(B)(9), *supra*, Petitioner contends that his appellate counsel—who also represented him at sentencing—operated under a conflict of interest because he abandoned Petitioner at sentencing. There is no suggestion that counsel "abandoned" Petitioner as that concept is employed in Missouri case law. Moreover, the argument that a conflict of interest resulted is simply frivolous.

3. Conflict of Interest, Part Two

Petitioner contends his appellate attorney operated under a conflict of interest that precluded him from raising meritorious issues on appeal. Specifically, he points to the fact that the attorney who represented him at sentencing also represented him on appeal, and thus the attorney acting in his appellate capacity could not raise claims that he had been ineffective at sentencing. Petitioner's argument is flawed because Rule 29.15 was the exclusive avenue for raising claims of ineffective assistance of counsel. *See Burns v. Gammon*, 173 F.3d 1089, 1094 (8th Cir. 1999). The failure to raise the claim on direct appeal was caused by Missouri's procedural rules, not a conflict of interest. The fact that appellate counsel represented Petitioner at sentencing does not afford him any relief.

4. Validity of Rule 29.15

Petitioner again recounts the circumstances under which the sentencing hearing was concluded and contends that Rule 29.15 is unconstitutional for failing to provide for an extension of time under these circumstances. Challenges to the constitutionality of Rule 29.15—including specifically its time limits—have been rejected so often that no citation is needed to reject this claim.

5. Ineffective Assistance of Appellate Counsel, Part One

In a claim related to the one presented in Part II(B)(6), *supra*, Petitioner contends his appellate attorney provided ineffective assistance when he failed to appeal the trial court's rejection of objections to portions of Detective Salva's testimony. Given "the reality that effective appellate advocacy often entails screening out weaker issues, the Sixth Amendment doesn't require that appellate counsel raise every colorable or non-frivolous issue on appeal. Absent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *Roe v. Delo*, 160 F.3d 416, 418 (8th Cir. 1998) (internal citations and quotations omitted). The Court has reviewed both objections to Detective Salva's testimony and concludes that the decision to forego raising them on appeal was reasonable.

The first objection was to Detective Salva's testimony regarding R.C.'s statements. The objection was withdrawn in light of the prosecutor's explanation that the evidence was offered as a prior consistent statement to rebut the suggestion, raised during the cross-examination of R.C., that R.C. fabricated portions of her testimony. Tr. at 187-89. In addition, there is no suggestion that this use of R.C.'s out-of-court statements was inadmissible in light of this purpose. For these reasons, the decision not to raise this issue on appeal violated neither of *Strickland's* prongs.

The next objection was lodged when Detective Salva was asked about R.C.'s demeanor when discussing the latest incident at Truman Lake. At one point during the lengthy sidebar, the prosecutor explained that R.C.'s "demeanor during the interview changed. When she talked about how he hit her the next day she got very angry. [Detective Salva's] trying to say how she was acting when he talked to her. He can testify about his own observations." Tr. at 195. Petitioner's counsel responded by declaring that he did not "have any objection to observations, Judge, but [the prosecutor's] asking about a consistent statement. That's all I'm objecting to. [Detective Salva] can talk about his observations all day long but he can't talk about what she told him unless it involves a statement that is in contradiction to testimony she was impeached on." *Id.* The trial court eventually overruled the objection. Tr. at 196. Detective Salva then described R.C.'s demeanor during his conversation with her. Tr. at 196. Detective Salva was not asked to relate any of R.C.'s statements about the Truman Lake incident, nor did he volunteer any. Thus, although the objection was overruled, the sort of testimony Petitioner's trial counsel sought to preclude was not introduced. There was nothing to appeal.

6. Ineffective Assistance of Appellate Counsel: Part Two

Petitioner contends his appellate counsel was ineffective for failing to challenge the prosecutor's explanation of Mo. Rev. Stat. § 558.019. According to Petitioner, the prosecutor "lied and mislead" when she suggested that the trial court should sentence Petitioner to a term of forty years to prevent the parole board from converting consecutive sentences into concurrent sentences.

To put the argument in context, the prosecutor had previously referred to the court's original intent that Petitioner serve forty years total and contended that Petitioner should not be sentenced to less time on this occasion (particularly given the presence of additional information not previously presented to the court). Tr. at 341. The prosecutor then said

> I think that the one thing the Court should consider is that the Missouri law has changed a little bit in that the parole board now has the ability to change a court sentence. Meaning, [if] you say, I want two 20-year sentences to run consecutive, totaling 40 years, the parole board can go back and say, "We'll run them concurrent because we've got jail overcrowding." That is a change in the law. I think the Court's intent was for the defendant to serve a 40-year

> sentence. If that is the intent of the Court, you should give a 40-year sentence . . . . That way the parole board can't go in and play with the numbers and change a consecutive sentence to a concurrent sentence.

Tr. at 341-42. Section 558.019.5 does permit the parole board to convert consecutive terms to concurrent terms in certain circumstances, but this provision did not apply to Petitioner because his offenses did not occur on or after August 28, 1994. *See* Mo. Rev. Stat. § 558.019.7.

The statement had no real effect on the proceedings. Essentially, the prosecutor argued to the trial judge that if it was his intent that Petitioner serve forty years, he should sentence Petitioner to forty years instead of consecutive sentences totaling forty years to avoid the risk that the parole board would reduce the sentence. The trial court obviously intended that Petitioner serve forty years in prison; otherwise, the trial court would not have imposed a forty year sentence. Assuming, for the sake of argument, that the trial court would have imposed consecutive sentences if the prosecutor had not overstated the parole board's power, it is fair to presume that the consecutive sentences would have totaled forty years because that was clearly the trial court's intent. As stated above, the parole board could not have reduced consecutive sentences in Petitioner's case. Ultimately, the misstatement could have had no effect on the *length* of Petitioner's sentence; it only could have effected the math involved in computing the length of sentence. The failure to raise this issue on appeal worked no prejudice to Petitioner.

II. CONCLUSION

For the foregoing reasons, Petitioner's request for a Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

/s/
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT
COURT

DATE February 18, 2000

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

September Session 1997

JOHN D. SEXTON)
APPELLANT,)
)
VS. (JACKSON)) WD 54229
) CIR. CT. CV96-31237
STATE OF MISSOURI,)
RESPONDENT.)

Now on this day the judgment denying the motion filed under Supreme Court Rule 29.15 is affirmed. The Respondent shall recover against the Appellant the costs and charges herein expended, and shall have execution therefor.

Order filed.

STATE OF MISSOURI-Sct.

I, TERENCE G. LORD, Clerk of the Missouri Court of Appeals, Western District, certify that the foregoing is a full, true and complete transcript of the judgment of the Missouri Court of Appeals, Western District, entered of record at the September Session thereof, 1997, and on the 28th day of Jackson, 1997, in the above entitled cause.

Given under my hand and the seal of the Court, at Kansas City, Missouri, this 19th day of November, 1997.

/s/
TERRENCE G. LORD, CLERK

cc: Circuit Court Clerk

929 S.W.2d 909

MISSOURI COURT OF APPEALS,

WESTERN DISTRICT.

STATE of Missouri, Respondent,

v.

John D. SEXTON, Appellant.

No. WD 51733.

Aug. 13, 1996.

Motion for Rehearing and/or Transfer to

Supreme Court Denied Oct. 1, 1996.

Before HANNA, P.J., and SMART and EDWIN H. SMITH, JJ.

EDWIN H. SMITH, Judge.

John D. Sexton appeals from his convictions for five counts of sodomy, § 566.060.3, [1] following a jury trial in the Circuit Court of Jackson County. He was sentenced as a "prior offender," § 566.060.3, and received five concurrent forty-year sentences. Appellant asserts five points on appeal: 1) the trial court erred in sentencing appellant to five forty-year concurrent sentences because such sentences exceeded the sentences previously imposed following his first trial; 2) the trial court erred in permitting the victim's rebuttal testimony because she was in the courtroom in violation of the witness exclusionary rule; 3) the trial court erred in excluding evidence and cross-examination of the victim concerning her knowledge of sexual matters gained from pornographic magazines; 4) the trial court erred in overruling appellant's motion for judgment of acquittal because there was insufficient evidence; and, 5) the trial court erred in overruling appellant's request for change of judge following remand. Judgment affirmed in part and reversed in part.

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[1] All statutory references are to RSMo. Supp. 1990 unless otherwise stated. Such statutes were in effect at the time the crimes were committed.

FACTS

John D. Sexton was charged with one count of rape and five counts of sodomy by Amended Information filed in the Circuit Court of Jackson County. On January 26, 1994, appellant was convicted on all counts following a jury trial and was sentenced to five concurrent twenty-year sentences for sodomy to be served consecutively to a twenty-year sentence for rape. Appellant appealed and this court reversed and remanded the cause on February 1, 1995. *State v. Sexton,* 890 S.W.2d 389 (Mo. App. 1995). On retrial, appellant was acquitted of rape but convicted by jury of five counts of sodomy, § 566.060.3, and was sentenced to concurrent 40-year terms of imprisonment as a "prior offender," § 558.016.2.

At the time of trial the victim, R.C., was eighteen years old. When she was approximately nine years old, her mother, Kathleen Sexton, married appellant. Appellant and his young son, Jessie, began living with R.C. and her mother in Lee's Summit, Missouri.

Within five or six months, appellant began subjecting his stepdaughter to a variety of physical and sexual abuse. He ordered her to kiss him on the lips and when she refused, he punched her with his fist in the mouth. When she still refused, he punched her in the nose and she finally acquiesced and kissed him on the lips.

Shortly after the abuse began, appellant removed all of her clothes, put her in a big yellow shirt, took her downstairs to the kitchen and turned on the garbage disposal. He placed her hand over the disposal and warned her that he would put her down there if she told anyone. He also told her that if she ever tried to leave or if she ever told on him that he would kill her.

When she was ten years old, a few months after he had forced her to kiss him on the lips, appellant placed his penis in her mouth and forced her to suck it. He would usually make her swallow the "white stuff" that came out of his penis when he ejaculated. He forced her to perform oral sex between three and four times a week. The incidents normally occurred in the morning when her mother was at work.

R.C. testified that over the period of time she lived with appellant, he placed his penis in her vagina, touched her vagina with his fingers and tongue, touched her breasts with his fingers and his mouth, and her "bottom" with his penis and his hands. She testified that she remembered on one occasion when she was ten or eleven, appellant bent her over the coffee table and pulled her pants down. He then inserted his penis into her rectum causing her bottom to bleed. On numerous other occasions appellant placed his penis in her vagina. These incidents of penile-genital conduct occurred in the bedroom at the family's home and in the family's trailer at Truman Lake.

At some point, appellant and her mother placed R.C. on birth control pills against her will. She was told that it was a precautionary measure to prevent against pregnancy in case somebody raped her because appellant didn't want her to get pregnant.

Appellant also used oral sex as a disciplinary tool and control mechanism. R.C. was given the choice between being whipped on the bare buttocks with a thick belt or performing oral sex whenever she needed to be punished. She normally chose the whippings which left marks and bruises on her arms, chest, legs and knees.

R.C. described an incident where appellant grabbed her by the hair and threw her down the stairs. She testified that he would hit her with his fists and throw various objects at her including tools, pencils, pillows, shoes and other items. Appellant would also force her to do something sexually if she wanted to socialize with her friends.

On November 10, 1992, following an incident of sexual abuse at Truman Lake, R.C. reported the abuse to the Lee's Summit police. She was removed from the home and placed in foster care temporarily before going to reside with her biological father.

I.

In Point I, appellant contends the trial court erred in sentencing him to five concurrent forty-year sentences because such sentences exceeded the sentences imposed following his first trial in which he received five concurrent twenty-year sentences for sodomy, to be served consecutively to a twenty-year sentence for rape. Appellant argues the increased sentences on his sodomy convictions negate the effect of his successful appeal.

Appellant argues that his sentences violate the prophylactic rule set forth in *North Carolina v. Pearce,* 395 U.S. 711, 726 (1969), overruled in part on other grounds, *Alabama v. Smith,* 490 U.S. 794 (1989). *Pearce* states that due process requires a defendant's sentence after retrial to be free from any vindictiveness by the court for successfully attacking his first conviction. *Id.* at 725. A defendant's fear of such vindictiveness may unconstitutionally deter his exercise of his right to appeal or collaterally attack his first conviction so he must be freed of apprehension to insure due process of law. *Id.* In order to guarantee the absence of such a motivation, the *Pearce* court held that whenever a judge imposes a more severe sentence upon a defendant after a new trial, he must state the reasons for doing so which must be based on objective information concerning conduct occurring after the time of the original sentence. *Id.* at 726. However, there is no violation of *Pearce* where the defendant has been tried and sentenced on multiple counts and is then resentenced and receives a different sentence on each viable count, but receives no greater sentence than the total sentence originally received. *State v. Brooks,* 551 S.W.2d 634, 660 (Mo. App. 1977).

> When a defendant is convicted of more than one count of a multicount indictment, the district court is likely to fashion a sentencing package in which sentences on individual counts are interdependent. When, on appeal, one or more counts of a multicount conviction are reversed and one or more counts are affirmed, the result is an "unbundled" sentencing package. [Citation omitted.] Because the sentences are interdependent, the reversal of convictions underlying some, but not all, of the sentences renders the sentencing package ineffective in carrying out the district court's sentencing intent as to any one of the sentences on the affirmed convictions.

United States v. Shue, 825 F.2d 1111, 1114 (7th Cir.), *cert. denied*, 484 U.S. 956 (1987). The *Shue* court held that the trial judge has the authority to re-evaluate the sentencing package in light of the changed circumstances and resentence the defendant to effectuate the original sentencing intent without violat[ing] *Pearce* or the Double Jeopardy Clause. *Id.*

Here, appellant originally received five concurrent twenty-year sentences for sodomy, to be served consecutively to a twenty-year sentence for rape totaling forty years of imprisonment. On retrial, he was acquitted of rape, but convicted of five counts of sodomy and sentenced to five concurrent 40-year sentences. Thus, the prophylactic rule announced in Pearce was not violated since the total sentence appellant received on retrial did not exceed the total sentence originally imposed.

Appellant argues that although his sentences on retrial total forty years, the same as his original sentences, his sentences on retrial have the effect of being more severe than his original sentences due to the enactment of § 558.019, RSMo. 1994. Section 558.019.5 provides that for purposes of construing the "minimum prison term" provisions, "in the case of consecutive sentences imposed at the same time pursuant to a course of conduct constituting a common scheme or plan," the parole board is "authorized to convert consecutive sentences to concurrent sentences, when the board finds, after hearing with notice to the prosecuting or circuit attorney, that the sum of the terms results in an unreasonably excessive total term, taking into consideration all factors related to the crime or crimes committed and the sentences received by others similarly situated." This provision by its own terms applies only to offenses occurring on or after August 28, 1994. Mo. Rev. Stat. § 558.019.7 (1994); *State v. Dean,* 898 S.W.2d 704, 706 (Mo. App. 1995). Appellant's offenses were alleged to have occurred "between September 1, 1990 through February 12, 1991." Thus, § 558.019.5 does not apply and appellant's argument is without merit. Point denied.

II.

In Point II, appellant asserts the trial court erred in permitting R.C.'s testimony because she was in the courtroom in violation of the witness exclusionary rule.

Respondent argues the witness exclusionary rule was never invoked. The trial judge stated on the record, "Well, the rule was never invoked." He explained, "I heard you guys talking about the rule. Nobody ever asked me to make a ruling." The trial judge's comments are dispositive of this issue. We find the witness exclusionary rule was never invoked.

Assuming, *arguendo,* that the rule was invoked, the decision to exclude the testimony of a witness who has violated the rule lies within the sound discretion of the trial court. *Id.* Absent special circumstances, the testimony of the offending witness should not be excluded solely because the rule was violated. *Id.* These "special circumstances" have generally been implicated only in cases where the witness violates the rule with "the consent, connivance or procurement of the party or counsel calling him." *State v. Gibson,* 760 S.W.2d 524, 526-27, (Mo. App. 1988).

Further, "where the testimony of the offending witness is offered for the limited purpose of impeachment and not as a part of the offering party's case-in-chief, courts are much more receptive to the evidence." *State v. Gilmore,* 797 S.W.2d 802, 807 (Mo. App. 1990). In fact, "when such witnesses testify in rebuttal and not on a matter for the state's case in chief, there is no abuse of discretion by the trial court." *State v. McMillian,* 779 S.W.2d 670, 671 (Mo. App. 1989).

The State called R.C. as a rebuttal witness after the defense rested. The rebuttal testimony involved collateral matters such as how many times she had seen her aunt, whether she had talked with appellant's mother on a personal basis, the number and nature of her contacts with her mother after she began living with her father, and whether appellant had ever beaten her with a belt. Her testimony related to nonessential issues that did not directly relate to the appellant's guilt or innocence of the crimes charged or the elements of those offenses. We find no abuse of discretion in the trial court allowing R.C. to testify on rebuttal. Point denied.

III.

In Point III, appellant contends the trial court erred in excluding evidence and cross-examination of R.C. concerning her knowledge of sexual matters gained from pornographic magazines.

We must first address respondent's assertion that this evidence is barred by the "rape shield statute." Mo. Rev. Stat. § 491.015 (1994). In order for the rape shield statute to be applicable, R.C.'s alleged possession of, and familiarity with, sexually explicit magazines must constitute "sexual conduct" within the meaning of § 491.015. This would be a case of first impression and we decline to determine the applicability of the rape shield statute under the circumstances here since we are able to dispose of the issue presented on other grounds.

The trial court has broad discretion in determining the relevancy of evidence and such ruling will not be disturbed absent a clear showing of abuse. *State v. Jacobs,* 861 S.W.2d 621, 624 (Mo. App. 1993). "It is not error to exclude evidence which has no bearing on the matters in issue and which is immaterial and irrelevant." *State v. Reichert,* 854 S.W.2d 584, 595 (Mo. App. 1993). Further, the scope and extent of both cross-examination and redirect examination are within the discretion of the trial court. *State v. Isa,* 850 S.W.2d 876, 896 (Mo. banc 1993)(cross- examination); *State v. Bowler,* 892 S.W.2d 717, 720 (Mo. App. 1994)(redirect examination). Our review is limited to an abuse of discretion. *Isa,* 850 S.W.2d at 896.

The court may preclude questioning during cross-examination which is outside the scope of direct examination and collateral to the main issue of the case. *Id.* The *Isa* court held the results of a child abuse hotline investigation were collateral to the main issue of whether Isa killed her daughter. *Id.*

Here, appellant attempted to question R.C. on recross-examination as to pornographic material found by her mother in R.C.'s bedroom under the bed. Defense counsel stated on the record that "the evidence will be that upon her departure from the home, pornographic books were found in her room by her parents . . . they're trying to portray her as naive and virginal. This evidence is designed to counter that." The court sustained prosecution's objection on relevancy and admissibility. Defense made the following offer of proof:

> Q: [R.C.], before you went to the police, you had looked at and seen literature that was sexually explicit, hadn't you?
>
> A: Yes.
>
> Q: And you, as a matter of fact, had literature that was sexually explicit in your bedroom, didn't you?
>
> A: Not willingly.

. . .

Q: Tell us what you had in your bedroom unwillingly that was sexually explicit?

A: It was a magazine that he had found in this duplex that they were cleaning and he told me to keep it.

. . .

Q: What did you do with it?

A: Put it underneath my bed.

Q: Never looked at it?

A: No.

The only attempt to introduce evidence of this nature was precluded by objection during recross-examination of R.C. during the prosecution's case-in-chief. Although R.C.'s mother testified as a defense witness, appellant did not elicit testimony that she found the pornography in R.C.'s room during the presentation of his case.

Whether R.C. had pornographic material underneath her bed was outside the scope of direct, cross and redirect examinations. Further, it is merely a collateral issue to the question of whether appellant sodomized and raped her. We find the trial court did not abuse its discretion in sustaining the prosecution's objection to this testimony.

Assuming *arguendo* the questioning was relevant, appellant was not prejudiced by its preclusion. "[I]f a witness is asked a question for the purpose of discrediting him, the person asking the question is concluded by his answer." *State v. Lynch,* 528 S.W.2d 454, 457 (Mo. App. 1975). Had the trial court allowed the questioning, appellant would have been concluded by her answers which clearly refuted his theory. Appellant also had the opportunity to elicit testimony of the existence of the pornographic materials through Mrs. Sexton's testimony which he failed to do. Thus, appellant was not prejudiced by its preclusion. Point denied.

IV.

In Point IV, appellant asserts the trial court erred in overruling appellant's motion for judgment of acquittal[2] because there was insufficient evidence to persuade a reasonable juror, beyond a reasonable doubt, of the elements of sodomy, in particular Count IV. Appellant also argues the evidence was deficient to prove that the acts alleged in Counts I, II, III, IV, V and VI occurred within the time alleged in the information. We will address these arguments separately.

In reviewing the sufficiency of the evidence, our review is limited to determining whether the evidence was sufficient to persuade any reasonable juror as to each of the elements of the crime beyond a reasonable doubt. *State v. Hargrave,* 915 S.W.2d 387, 389 (Mo. App. 1996); *State v. Silvey,* 894 S.W.2d 662, 673 (Mo. banc 1995); *State v. O'Brien,* 857 S.W.2d 212, 215 (Mo. banc 1993). The evidence and all reasonable inferences drawn therefrom are construed in a light most favorable to the jury's verdict with all contrary evidence and inferences disregarded. *Hargrave,* 915 S.W.2d at 389; *Silvey,* 894 S.W.2d at 673. Although we will not weigh the evidence, we must scrutinize the record to assure that the evidence was indeed substantial. *State v. Jennings,* 649 S.W.2d 448, 451 (Mo. App. 1983); *State v. Villa-Perez,* 835 S.W.2d 897, 900 (Mo. banc 1992).

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[2] Appellant filed a Motion for Judgment of Acquittal at the close of the State's evidence, at the close of all the evidence and on June 28, 1995, after trial. Appellant does not indicate from which motion he alleges error. The first two motions are completely identical and include some of the same issues as presented in the June 28 motion.

A. ELEMENTS OF SODOMY

Appellant was charged as follows: Count I, Rape; Count II, Sodomy (by placing his penis in R.C.'s anus); Count III, Sodomy (by placing his penis in R.C.'s mouth); Count IV, Sodomy (by placing his penis in R.C.'s hand); Count V, Sodomy (by placing his finger in R.C.'s vagina); and Count VI, Sodomy (by placing his mouth on R.C.'s vagina). The jury acquitted appellant of rape, but convicted him of the remaining five counts of sodomy.

Section 566.060.3 provided that "[a] person commits the crime of sodomy if he has deviate sexual intercourse with another person to whom he is not married who is less than fourteen years old." Deviant sexual intercourse is defined in § 566.010.2 as "any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person."

The reliability, credibility and weight of the witnesses' testimony is an issue for the jury to determine. *State v. Sumowski,* 794 S.W.2d 643, 645 (Mo. banc 1990); *State v. Parrish,* 852 S.W.2d 426, 428 (Mo. App. 1993). The jury may accept or reject all, some or none of a witness's testimony, in addition to, resolving any contradictions or conflicts in that witness's testimony. *State v. Dulany,* 781 S.W.2d 52, 55 (Mo. banc 1989). The testimony of a single witness will suffice to support a criminal conviction. *State v. Graham,* 906 S.W.2d 771, 778 (Mo. App. 1995). The victim's testimony alone will sustain a conviction even if uncorroborated in sex offense cases unless it is so contradictory and in conflict with the physical facts, surrounding circumstances and common experience that its validity is rendered doubtful. *Id.*

The record is replete with evidence in support of Counts II, III, V and VI. R.C. testified that appellant touched her vagina and had performed anal and oral sex on her. She also testified that he made her perform oral sex on him three to four times a week for seven years. The evidence was sufficient to persuade a reasonable juror beyond a reasonable doubt of appellant's guilt on Counts II, III, V and VI. Point denied as to Counts II, III, V and VI.

Count IV alleges appellant committed sodomy by placing his penis in R.C.'s hand. During defense counsel's argument in support of his Motion for Judgment of Acquittal at the close of the State's evidence, defense counsel argued that R.C. did not testify to any hand-penile contact. The court acknowledged the lack of such evidence by stating ". . . I don't remember any evidence about hand- penile contact. Do you?" Later the court further stated "I don't remember any evidence of hand-penile contact. If your notes indicate that you asked such a question and it's in the transcript, why—." In response, the prosecution stated:

> Judge, in reviewing my notes on R.C.'s testimony, I don't see in there where I specifically asked her about her hand touching the defendant's penis. I think all counts should still go to the jury. I think a reasonable inference can be made when there was all this contact, especially oral sex she would have touched his penis. I believe the statement that was admitted into evidence that, her statement to Chris Salva, although it does not directly touch this issue, has a description there of his penis being hard and so forth. I believe the State is entitled to reasonable inferences. I believe that due to the totality of all the evidence, that that count should be permitted to go to the jury.
>
> THE COURT: One of my instructions in this case is going to be, no statement—well—it is your duty to determine the facts and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence. So I'll overrule the motion as to Count IV. . . .

Upon review of the record, we find the prosecution presented no direct evidence that appellant placed his penis in R.C.'s hand committing sodomy. The prosecution argues that we can reasonably infer that hand-penile contact occurred due to the many occurrences of oral sex. We decline to outline the various ways that oral sex may be performed without such contact and hold that is not a reasonable inference. Thus, we find there was insufficient evidence to submit Count IV, sodomy, to the jury, therefore, appellant's conviction on Count IV must be reversed.

B. TIME FRAME

Appellant argues the evidence was deficient to prove that the acts of sodomy occurred within the time alleged in the information. However, "[t]ime is not of the essence in sex offense cases." *State v. Mills,* 872 S.W.2d 875, 878 (Mo. App. 1994). Thus, the state is not confined in its evidence to the precise date stated in the information, but may prove the offense to have been committed any day prior to the date of the information and within the period of limitation. *State v. Gardner,* 849 S.W.2d 602, 605 (Mo. App. 1993); *Mills,* 872 S.W.2d at 878. The statute of limitations for the crime of sodomy is "ten years after commission of the offense[s]." Mo. Rev. Stat. § 556.037 (Supp. 1990).

Here, the earliest act of sodomy took place in 1987 or early 1988 when R.C. was ten years old and first forced to perform oral sex on appellant. The amended information and the instructions provided the time period involved as between September 1, 1990, through February 12, 1991. R.C. testified that the various acts of sodomy occurred continually over a number of years beginning in 1987 when she was 10 years old and continued until she reported them to the police in 1992. The jury could have reasonably concluded, beyond a reasonable doubt, that each of the charged offenses occurred within the time frame provided by the information or prior to the date of the information which is consistent with *Gardner* and *Mills*. Point denied.

V.

In Point V, appellant contends the trial court erred in overruling appellant's request for change of judge following remand. Appellant argues his request was timely and he was entitled to a change of judge as a matter of right under Rule 32.07. However, appellant's entire argument references Rule 32.07 before it was amended.[3] The amendment became effective on January 1, 1995. Here, the Mandate of the Missouri Court of Appeals reversing and remanding the judgment in *State of Missouri v. John D. Sexton,* 890 S.W.2d 389 (Mo. App. 1995) was forwarded to the Circuit Court of Jackson County on February 1, 1995, which is clearly after the amendment took effect. Therefore, we will review appellant's argument under the amended Rule 32.07.

Rule 32.07 as amended provides:

> (b) In felony and misdemeanor cases the application must be filed *not later than ten days after the initial plea is entered*. If the designation of the trial judge occurs more than ten days after the *initial* plea is entered, the application *shall be filed within ten days of the designation of the trial judge* or prior to commencement of any proceeding on the record, whichever is earlier. (emphasis added).

Here, there is no dispute that appellant failed to file his request for change of judge within ten days after the initial plea was entered as required by Rule 32.07. Although the date appellant entered his initial plea is not in the record, it would have had to have been before January 26, 1994, the date of the guilty verdicts in his first trial. Appellant filed his Request for Change of Judge on February 21, 1995, which is clearly past the ten day period from the latest possible date appellant could have entered his initial plea.

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[3] Before the January 1, 1995 amendment, Missouri Supreme Court Rule 32.07 provided: (c) In felony cases the application must be filed not later than thirty days after arraignment if the trial judge is designated at arraignment. If the trial judge is not designated at arraignment, the application must be filed no later than thirty days after the designation of the trial judge and notification to the parties or their attorneys. If the designation of the trial judge occurs less than thirty days before trial, the application must be filed prior to commencement of any proceeding on the record.

Further, a remand to the Circuit Court does not constitute the filing of a new charge requiring appellant to be arraigned and an "initial" plea to be entered to a new charge. Thus, a new ten day time frame under Rule 32.07 did not begin when the cause was remanded for retrial. Appellant concedes he did not request a change of judge before his first trial, therefore, the time frame provided for in Rule 32.07 had run before the commencement of the first trial thereby rendering this application untimely. *See Anderson v. Anderson,* 861 S.W.2d 796, 800 (Mo. App. 1993). Further, the same trial judge was to preside over the second trial ruling out the provision allowing ten days after the designation of the trial judge. *See State ex rel. Burns v. Goeke,* 884 S.W.2d 60, 62 (Mo. App. 1994). Appellant's application is not timely and was properly denied. Point denied.

CONCLUSION

Appellant's convictions as to Counts II, III, V and VI are affirmed. His conviction on Count IV for sodomy, § 566.060.3, is reversed.

890 S.W.2d 389

MISSOURI COURT OF APPEALS,

WESTERN DISTRICT.

STATE of Missouri, Respondent,

v.

John D. SEXTON, Appellant.

No. WD 49298.

Jan. 10, 1995.

Before FENNER, C.J., HANNA and LAURA DENVIR STITH, JJ.

STITH, Judge.

This case involves the admission of testimony of uncharged sexual misconduct in the 1994 trial of John D. Sexton on one count of rape and five counts of sodomy. Mr. Sexton was found guilty by the jury and sentenced to consecutive prison terms totalling forty years.

The State admits that the admission of evidence of prior sexual misconduct to show the defendant's propensity to commit the crime constituted error under *State v. Bernard*, 849 S.W.2d 10, 16-17 (Mo. banc 1993). The State argues that remand for a new trial on all issues is unnecessary, however, because the same evidence will be admissible in any new trial. Thus, remand would be pointless. We disagree, and remand for a new trial on all issues.

Mr. Sexton's convictions arose from incidents occurring in 1990 and 1991, and involving his stepdaughter, Rachel. Rachel, who was under age fourteen at the time of the incidents, accused her step-father of sexually abusing her from the time she was age nine or ten until shortly before her fourteenth birthday. The alleged abuse ranged from fondling to sodomy and rape.[1]

To bolster its case, the State offered the testimony of Mr. Sexton's two other stepdaughters from an earlier marriage as to uncharged sexual misconduct which they alleged he committed with them during the earlier marriage.[2]

Case law regarding the admissibility of evidence of a defendant's prior sexual misconduct in a prosecution for a sexual offense was changed significantly by the Missouri Supreme Court's decision in *Bernard,* 849 S.W.2d at 16-17, a short time before the trial of this case. As is set out in detail in *Bernard,* evidence of other, uncharged misconduct has historically been inadmissible in Missouri unless admissible to establish motive, intent, absence of mistake, common scheme or plan or identity. *Id.* at 13-14.

State v. Lachterman, 812 S.W.2d 759, 768 (Mo. App. 1991), *cert. denied,* 503 U.S. 983 (1992), recognized that, over time, Missouri courts had interpreted the exceptions for motive, identity, and common scheme or plan more broadly than was warranted. They appeared to have done so in order to justify admission of evidence which, in reality, had the effect of showing that defendant had a propensity to engage in sexual misconduct and so probably acted in accordance with that propensity with the current victim.

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[1] Rachel testified that the abuse began when Mr. Sexton kissed her, touched her breasts, touched her vaginal area with his hands and later his penis, eventually penetrating her vagina, and repeatedly forced her to perform sodomy on him and performed sodomy on her.

[2] Mr. Sexton had been convicted of sexual misconduct as to the stepdaughters, and their testimony both concerned this misconduct and went beyond it. Lisa testified that, when she was age nine, Mr. Sexton had grabbed her hand and placed it around his penis. In her testimony, Christy related that, when she was age twelve, Mr. Sexton had repeatedly fondled her breasts and vaginal area, had forced her to weigh naked in front of him, and once had forced himself on top of her on a bed and pressed his genitals against hers.

While *Lachterman* disapproved of these prior cases' misuse of the recognized exceptions, it articulated a new exception which it called the "depraved sexual instinct" exception. Under that exception, evidence of the defendant's repeated acts of sexual abuse of children of the same sex as the victim near in time to the acts charged was admissible to demonstrate a propensity for sexual aberration and a depraved sexual instinct. 812 S.W.2d at 768-69.

The propriety of Lachterman's "depraved sexual instinct" exception was unanimously rejected by the Missouri Supreme Court in *Bernard,* 849 S.W.2d at 16-17. *Bernard* did recognize a very narrow situation in which such evidence could be admitted, however: when the evidence is true "signature *modus operandi* /corroboration" evidence. In order to fall within the "signature" exception, "[e]vidence of prior sexual misconduct that corroborates the testimony of the victim should be nearly identical to the charged crime and so unusual and distinctive as to be a signature of the defendant's *modus operandi.*" *Bernard,* 849 S.W.2d at 17.

The State concedes, and we agree, that admitting the prior sexual misconduct evidence below constituted error under *Bernard.* Although some similarities existed in the sexual abuse described by Rachel, Lisa, and Christy, the methodology involved in each incident lacked the requisite uniqueness to identify Mr. Sexton as the wrongdoer under the "signature *modus operandi*" exception. Admitting testimony of Mr. Sexton's prior sexual abuse of Lisa and Christy thus violated the holding of *Bernard.*

The State suggests that in the event this cause is remanded for a new trial because of the erroneous admission of evidence of prior sexual misconduct, the only issue on remand should be the applicability of a newly enacted sex crimes statute, Section 566.025. That section originated as Senate Bill 693, was approved by our General Assembly on July 14, 1994, and became effective January 1, 1995. The new enactment appears to legislatively overrule the *Bernard* exception and to allow admission of uncharged sexual misconduct evidence if, but only if, specified circumstances are present. Section 566.025 provides in its entirety:

> In prosecutions under chapters 566 or 568 involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged provided that such evidence involves acts that occurred within ten years before or after the act or acts for which the defendant is being tried.[3]

The State suggests section 566.025 simply changes the rules of evidence without authorizing conviction on less or different proof. If so, the statute is procedural in nature, and can be applied to all persons being tried following its effective date, even if the crime occurred at an earlier time, without violating the prohibition against *ex post facto* laws. *State v. Stevens,* 757 S.W.2d 229, 231-32 (Mo. App. 1988). *See also State v. Belk,* 759 S.W.2d 257, 259 (Mo. App. 1988).

Mr. Sexton suggests that the statute's effects are more than procedural because the statute will be used to introduce evidence of other alleged crimes. He notes that *Bernard* itself recognizes that propensity evidence can lead the jury to find the defendant guilty based on his prior misconduct, rather than because of any evidence he actually committed the crime with which he is charged. He also quotes from *State v. Reese,* 364

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[3] Section 566.025 is not yet officially codified, but its text appears in *Vernon's Missouri Legislative Service,* West's No. 176 (1994).

Mo. 1221, 274 S.W.2d 304 (Mo. banc 1954), cited in *Bernard,* which states:

> Evidence of other crimes, when not properly related to the cause on trial, violates defendant's right to be tried for the offense for which he is indicted. *State v. Shilkett,* 356 Mo. 1081, 204 S.W.2d 920, 922-23 [(1947)].

State v. Reese, 274 S.W.2d at 307.

This is not the forum for resolving these constitutional issues. It may be that, on remand, the trial court will find (as defendant suggests) that the statute does not apply because one of its criteria is not met. In that case, the constitutional issue need not be reached at all. If Section 566.025's requirements are found to be met on remand, however, then Mr. Sexton must be given a full opportunity to raise and argue the constitutionality of that section and of its application to him.

In Point IV, Mr. Sexton argues his conviction should be reversed without remand for a new trial because the State failed to prove that Rachel was under age fourteen at the time of the offenses, an essential element of the crimes charged. We disagree. We must give the State the benefit of all reasonable inferences, disregarding any contrary inferences. *State v. Grim,* 854 S.W.2d 403, 411 (Mo. banc 1993). Rachel testified that all of the incidents occurred before her fourteenth birthday. While her testimony did not place specific acts on specific days, this was not required. Her testimony, if believed, provided an adequate basis on which the jury could determine that defendant was guilty of the crimes charged.

Only one of Mr. Sexton's remaining points on appeal is likely to recur in any retrial. In Point III, Mr. Sexton asserts error in allowing Lisa and Christy to testify, over his objection, that they had been afraid to report his sexual misconduct against them during his earlier marriage to their mother because he had regularly beaten their mother during that marriage. Defendant argues the evidence of Lisa and

Christy's fear was improperly used to bolster Rachel's credibility as to why she was afraid to report her stepfather's sexual abuse of her when married to her mother a decade later.

The State does not even argue in its brief that such evidence fit within any exception, and we find that it did not. Whether or not defendant beat his previous wife, and whether or not his stepchildren from that marriage were afraid of him, was inadmissible to show why Rachel failed to report his misconduct against her ten years later. We need not reach the issue whether the admission of this evidence was itself prejudicial error. Rather, should the same issue arise on retrial, we direct the trial court to exclude such evidence unless the State demonstrates that it fits within one of the recognized exceptions.

We accordingly reverse Mr. Sexton's convictions and sentence and remand the cause with directions for a new trial on all issues in conformity with this opinion.

All concur.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2764

John Sexton, *
*
Appellant, * Order Denying Petition for
* Rehearing and for Rehearing
vs. * En Banc
*
Mike Kemna, *
*
Appellee. *

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Morris S. Arnold would grant the petition for rehearing en banc.

(5128-010199)

March 29, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

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FILED

AUG 28 2002

OFFICE OF THE CLERK

No. 02-154

IN THE SUPREME COURT OF THE UNITED STATES

JOHN SEXTON,
Petitioner,

v.

MIKE KEMNA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

ANDREW W. HASSELL
Assistant Attorney General
Of Counsel

Missouri Attorney General's Office
P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Attorneys for Respondent

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Statement of the Case

Petitioner John Sexton was convicted in the Circuit Court of Jackson County, Missouri, of one count of rape and five counts of sodomy, and the court sentenced petitioner to twenty years imprisonment on each sodomy count, the sentences to be served concurrently to each other and consecutively to the sentence of twenty years imprisonment on the rape count. Pet. App. at 69a. The Missouri Court of Appeals reversed petitioner's sentences and remanded for new trial because improper evidence of petitioner's prior sexual conduct was introduced. Pet. App. at 69a-74a. At retrial, petitioner was acquitted of the rape charge and convicted on each of the five sodomy charges, for which the court sentenced him to five concurrent forty-year sentences. Pet. App. 54a-68a. The Missouri Court of Appeals affirmed four of the five convictions, but reversed one sodomy conviction due to insufficient evidence. Id.

The Missouri Court of Appeals stated the sordid facts of petitioner's crimes as follows.

> At the time of trial the victim, R.C., was eighteen years old. When she was approximately nine years old, her mother, Kathleen Sexton, married appellant. Appellant and his young son, Jessie, began living with R.C. and her mother in Lee's Summit, Missouri.
>
> Within five or six months, appellant began subjecting his stepdaughter to a variety of physical and sexual abuse. He ordered her to kiss him on the lips and when she refused, he

punched her with his fist in the mouth. When she still refused, he punched her in the nose and she finally acquiesced and kissed him on the lips.

Shortly after the abuse began, appellant removed all of her clothes, put her in a big yellow shirt, took her downstairs to the kitchen and turned on the garbage disposal. He placed her hand over the disposal and warned her that he would put her down there if she told anyone. He also told her that if she ever tried to leave or if she ever told on him that he would kill her.

When she was ten years old, a few months after he had forced her to kiss him on the lips, appellant placed his penis in her mouth and forced her to suck it. He would usually make her swallow the "white stuff" that came out of his penis when he ejaculated. He forced her to perform oral sex between three and four times a week. The incidents normally occurred in the morning when her mother was at work.

R.C. testified that over the period of time she lived with appellant, he placed his penis in her vagina, touched her vagina with his fingers and tongue, touched her breasts with his fingers and his mouth, and her "bottom" with his penis and his hands. She testified that she remembered on one occasion when she was ten or eleven, appellant bent her over the coffee table and pulled her pants down. He then inserted his penis into her rectum causing her bottom to bleed. On numerous other occasions appellant placed his penis in her vagina. These incidents of penile-genital conduct occurred in the bedroom at the family's home and in the family's trailer at Truman Lake.

At some point, appellant and her mother placed R.C. on birth control pills against her will. She was told that it was a precautionary measure to prevent against pregnancy in case somebody raped her because appellant didn't want her to get pregnant.

Appellant also used oral sex as a disciplinary tool and control mechanism. R.C. was given the choice between being whipped on the bare buttocks with a thick belt or performing oral sex whenever she needed to be punished. She normally chose the whippings which left marks and bruises on her arms, chest, legs and knees.

R.C. described an incident where appellant grabbed her by the hair and threw her down the stairs. She testified that he would hit her with his fists and throw various objects at her including tools, pencils, pillows, shoes and other items. Appellant would also force her to do something sexually if she wanted to socialize with her friends.

> On November 10, 1992, following an incident of sexual abuse at Truman Lake, R.C. reported the abuse to the Lee's Summit police. She was removed from the home and placed in foster care temporarily before going to reside with her biological father.

Pet. App. at 55a-57a.

After exhausting his remedies in the Missouri State courts, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Western District of Missouri. The District Court denied all of petitioner's claims, Pet. App. 22a-51a, but granted a certificate of appealability on five issues, Pet. App. 18a-21a. Petitioner appealed to the Eighth Circuit, and that court affirmed the district court, Pet. App. 1a, and subsequently denied rehearing by the panel and *en banc*, Pet. App. 75a. This petition for writ of certiorari followed.

ARGUMENT

I. The Eighth Circuit correctly found that the Missouri Court of Appeals' decision was not contrary to or an unreasonable application of this Court's precedent.

The Missouri Court of Appeals held that petitioner's resentencing did not violate this Court's holding in Pearce v. North Carolina, 395 U.S.711 (1969). The Missouri court held that trial judges, when resentencing a defendant on multiple counts following a successful appeal, may reevaluate the "package" of sentences given at the original sentencing, adopting the Seventh Circuit's position in United States v. Shue, 825 F.2d 1111, 1114 (7th Cir.), *cert. denied* 484 U.S. 956 (1987). Pet. App. At 58a. The Missouri court then found that no violation of Pearce had occurred in petitioner's case because petitioner's new sentences were no greater than the sentences originally imposed. Id.

The Eighth Circuit found that the Missouri Court's decision was reasonable. The Eighth Circuit stated that the standard of review for this 28 U.S.C. §2254 claim under the Anti-terrorism and Effective Death Penalty Act (AEDPA) was as follows:

> The Anti-terrorism and Effective Death Penalty Act of 1996 amended the federal habeas corpus statute to provide that relief may not be granted to a person in state custody unless the underlying state proceeding:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court

> of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d). The Supreme Court recently clarified the proper interpretation § 2254(d)(1). Writing for a majority of the Court on this issue, Justice O'Connor explained that the "contrary to" clause limits habeas relief to cases in which "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or . . . decides a case differently than this Court has on a set of materially indistinguishable facts." The "unreasonable application" clause permits the writ to issue only "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 529 U.S. 362, 402-13, 146 L. Ed. 2d 389, 120 S.Ct. 1495 (2000).

Pet. App. at 3a-4a. The Eighth Circuit found that the Missouri Court's opinion was not an unreasonable application of this Court's precedent because other courts had adopted the same rule that the Missouri Court of Appeals did and because this Court had not extended its decision in Pearce to cover resentencing on multiple counts. Pet. App. at 6a-7a.

A. The Eighth Circuit correctly found that the Missouri Court of Appeals' decision is not contrary to any decision of this Court

Petitioner concedes in his petition for certiorari that this Court has not ruled on the question that he presents. Pet. at 5, 21. A state decision is "contrary to" clearly established federal law only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 435 (2000). As this Court has not ruled on this question, the Missouri Court of Appeals' ruling cannot be contrary to a (nonexistent) ruling from this Court.

B. The Eighth Circuit correctly found that the Missouri Court of Appeal's decision is not an unreasonable application of clearly established federal law.

The Eighth Circuit's decision, and the decision of the Missouri Court of Appeals, are reasonable and correct within the meaning of 28 U.S.C. §2254(d)(1). This Court stated that a decision is based on "an unreasonable application of clearly established federal law" if the state court correctly cites the governing legal principles from the Supreme Court but "unreasonably applies that principle to the facts of the prisoner's case." Id. This standard is objective, rather than subjective. Williams, 529 U.S. at 409. An unreasonable application of federal law is different from an incorrect application of federal law. Id. at 410. A federal court may not issue the writ simply because it concludes, in its independent judgment, that the state court applied clearly established federal law erroneously or incorrectly. Id. at 411. Rather, the application must also be objectively unreasonable. Id.

In the case at bar, petitioner contends, and has thoroughly and admirably researched, that seven circuits, including the Eighth Circuit, and two state courts of last resort follow the position adopted by the Missouri Court of Appeals that Pearce analysis for resentencing on multiple counts compares the aggregate "package" of the original and new sentences. Pet. at 7. Petitioner also correctly points out that the District of Colombia Circuit utilizes a modified version of the above test that looks at whether the sentences could have been viewed as a "package" at the time of the original sentence. Pet. at 9. Petitioner's research shows that three circuits and one state court of last resort have adopted a "remainder" rule allowing comparison only of the original sentences and the subsequent sentences for those counts that were not dropped or reversed, that the Illinois and Pennsylvania Supreme Courts compare sentences count by count, and that the New York Court of Appeals has not established a rule but considers each case on its own merits. Pet. at 9-11.

The diversity among these courts to the question at hand show that reasonable jurists differ about what the correct answer to petitioner's question is. The position taken by the Missouri Court of Appeals and the Eighth Circuit is not unreasonable simply because the Second Circuit, the Eleventh Circuit, the Fourth Circuit, and the Supreme Courts of Connecticut, Illinois, and Pennsylvania disagree with it. The fact that courts are split on this issue is evidence that both sides of this question have a reasonable basis in law.

This Court in Williams stated that in order to satisfy the "reasonableness" prong of §2254(d), a decision must be objectively unreasonable. Williams, *supra*, 529 U.S. at 411. This Court stressed that an incorrect decision is distinct from an unreasonable decision. Bell v. Cone, __U.S.__, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002), Williams, *supra*, 529 U.S. at 409-10. The question of whether the Eighth Circuit may or may not be correct in its interpretation of Pearce, to which petitioner devotes nearly his entire petition, is thus irrelevant to the case at bar. The only question is whether the Eighth Circuit was correct in finding that the Missouri Court of Appeals' decision was reasonable. The current debate among courts about how to apply this Court's decision in Pearce to cases involving resentencing on multiple counts shows that the Missouri Court of Appeals' decision was reasonable. Therefore, in holding that the Missouri Court of Appeals' decision that petitioner's sentence was constitutional in light of Pearce was not an unreasonable application of clearly established federal law, the Eighth Circuit correctly stated and applied the law as stated by this Court, and certiorari is not warranted on this point.

Further, as the Eighth Circuit applied the correct AEDPA standard of review in this case, any review of this case would only involve the Eighth Circuit's misapplication of the AEDPA standard. As the Court's Rule 10 states, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law." This Court in Williams v. Taylor and Bell v. Cone has established the standard of deciding AEDPA cases. Any resolution of this point by this Court would not establish any new law but would be fact-intensive to this case as the correct standard already exists. Therefore, this case is not a case that merits review by writ of certiorari of this

Court.

Finally, petitioner contends that this Court needs to resolve the split within the circuits and the State courts of last resort. However, because this case arises out of habeas corpus, this case is ill-equipped to do so. As shown above, reasonable jurists disagree about the correct answer to the question that petitioner poses, and that reasonableness determination forecloses any further review of this case under William v. Taylor, *supra*. In order for the Court to squarely consider the Pearce issue in this case, this Court would need a case on direct appeal (as Pearce was) from a State court or a federal circuit court as the Williams standard forecloses any answer to petitioner's question in a habeas case. Therefore, this case would not answer the question that petitioner seeks resolved, and thus certiorari is not necessary in this case.

CONCLUSION

For the foregoing reasons, the respondent prays that the Court enter its order denying the petitioner for writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242
Counsel of Record

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346
Of Counsel

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

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No. 02- 154

IN THE

Supreme Court of the United States

JOHN SEXTON,

Petitioner,

v.

MIKE KEMNA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

Of Counsel:
PATRICK J. BERRIGAN
WATSON & DAMERON
2500 Holmes Road
Kansas City, MO 64108
(816) 474-3350

GREGORY A. CASTANIAS
(*Counsel of Record*)
ELIZABETH REES
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

6 pp

REPLY BRIEF FOR PETITIONER

The brief in opposition ("Opp.") challenges almost none of the showings made in the petition ("Pet."). Except for arguing—incorrectly—that the posture of this case as a habeas corpus action somehow impedes this Court's review, respondent concedes, expressly or by his silence, that all of the essential elements for certiorari are present. The petition should be granted.

1. Respondent *agrees* (Opp. at 4) that there is a clear, deep, and irreconcilable split among the courts of appeals and state courts of last resort on the issue before the Court—the proper application of the Due Process Clause's presumption of vindictiveness from *North Carolina v. Pearce*, 395 U.S. 711 (1969) where multiple-count indictments are concerned. *See* Pet. at 5-11. Indeed, respondent praises the "thoroug[h] and admirabl[e] research" that demonstrates this national "diversity" in judicial treatment. Opp. at 4.

2. Just as importantly, respondent *offers no response* to petitioner's showing (Pet. at 12-21) that the decision below cannot be reconciled with this Court's decision in *Pearce* and its companion case, *Simpson v. Rice*, which itself applied a rule in a multi-count sentencing case—the "remainder" rule—flatly contrary to the majority decision below. Pet. at 12-13; *Pearce*, 395 U.S. at 726. Respondent's failure to address this aspect of the petition is all the more glaring in view of the single, "vehicular" argument against certiorari that respondent does offer. *See* point 4, *infra*.

3. Likewise, respondent *offers no response* to petitioner's showing (Pet. at 21-22) that the *Pearce* issue presented by the petition is an important and recurring one. Respondent does not (and could not) deny, in view of the current and increasing prevalence of multiple-count indictments and convictions, that this issue is of paramount importance to all federal and state criminal proceedings, all of which are subject to the Due

Process Clause's guarantee that criminal sentences will not be infected by judicial vindictiveness.

4. Respondent, agreeing—as he must—with all of these propositions, offers but one argument against certiorari. He claims that the "diversity among these courts to the question at hand show[s] that reasonable jurists differ about what the correct answer to petitioner's question is" (Opp. at 4), thus demonstrating that the decision below is neither "contrary to" nor "an unreasonable application of" clearly established Federal law as determined by this Court. Opp. at 3-6 (quoting 28 U.S.C. § 2254(d)(1)). This lone argument against certiorari is based on respondent's fundamental misunderstanding of this habeas statute, his misreading of this Court's precedents, and his misrepresentation of petitioner's arguments.

a. The first component of respondent's argument —that the decision of the Missouri Court of Appeals was not "contrary to" clearly established Federal law (Opp. at 3)—is based on both misrepresentation and misunderstanding. Respondent is reduced to claiming that "[p]etitioner concedes in his petition for certiorari that this Court has not ruled on the question that he presents. Pet. at 5, 21." A straightforward reading of pages 5, 21, and indeed all other pages in the petition will disclose no such "concession." Nor would such a "concession" have made any sense in view of petitioner's clear argument that the decision below "conflicts with *North Carolina v. Pearce* and its companion case, *Simpson v. Rice*." Pet. at 12. This Court *has* ruled on the question, and when it did, it "arrive[d] at a conclusion opposite to that reached by" the Missouri Court of Appeals and Eighth Circuit below. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). As petitioner earlier put it (Pet. at 17), "it was not necessary to 'extend' *Pearce* at all to give petitioner relief in this case. All that is necessary is that *Pearce* be applied."

b. The second component of respondent's argument—that the Missouri court's decision did not involve an "unreasonable application of clearly established Federal law" (Opp. at 3-6)—also fails. *First*, of course, the flat conflict with this Court's decision in *Pearce* and *Simpson v. Rice* means, perforce, that the Missouri decision was unreasonable. *Second*, moreover, respondent's argument—that the split among the circuits and state courts "show[s] that reasonable jurists differ" (Opp. at 4)—is itself flatly contrary to this Court's decisions, which have explicitly rejected respondent's "reasonable jurist" interpretation of 28 U.S.C. § 2254(d)(1)'s "unreasonable application" prong as too vague and subjective:

> The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one.

Williams v. Taylor, 529 U.S. at 409-10; *see also Penry v. Johnson*, 532 U.S. 782, 793 (2001) (noting that the lower court erroneously utilized a "reasonable jurists" standard, which "we later rejected in *Williams*"). Respondent's reliance on the "reasonable jurist" standard rejected in *Williams v. Taylor* is all the more perplexing since that is the single most-cited case in the brief in opposition.

Under any objective standard, the lower court's application of *Pearce* in this case was unreasonable. As explained in the petition (Pet. at 12-21), and above, the Missouri Court of Appeals' affirmance of petitioner's second sentence was (at least) an objectively unreasonable application of this Court's decision in *Pearce*.

c. Respondent claims that this case is unsuitable for review because it arises from a habeas corpus petition and therefore will not allow this Court to establish a governing legal principle or resolve the split within the courts. Opp. at 5-6. These arguments are also meritless.

Contrary to respondent's implication, this Court did not stop granting certiorari to consider substantive legal issues raised in habeas corpus petitions following the AEDPA amendment. *See, e.g., Bell v. Cone*, 122 S. Ct. 1843 (2002); *Penry v. Johnson*, 532 U.S. 782 (2001); *Ramdass v. Angelone*, 530 U.S. 156 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000); *Weeks v. Angelone*, 528 U.S. 225 (2000). This Court has addressed substantive issues of, *inter alia*, ineffective assistance of counsel and self-incrimination using recent post-AEDPA-amendment habeas cases as vehicles for those decisions. *See, e.g., Bell v. Cone*, 122 S. Ct. at 1850-52 (discussing *Strickland v. Washington*, 466 U.S. 688 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984) and their application to petitioner's ineffective-assistance-of-counsel claim); *Penry v. Johnson*, 532 U.S. at 793-96 (discussing *Estelle v. Smith*, 451 U.S. 454 (1981) and its application to petitioner's argument that admission of evidence violated his Fifth Amendment privilege against self-incrimination); *Williams v. Taylor*, 529 U.S. at 391-98 (discussing *Strickland* and other cases which the state court believed to have modified *Strickland*). Indeed, in *Penry v. Johnson, supra*, the question presented by the defendant/petitioner did not involve the "contrary to" or "unreasonable application" standards of 28 U.S.C. § 2254(d)(1), yet review was granted.* Certiorari

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* The questions presented in *Penry v. Johnson* were:

> (1) Was the trial court's submission to the jury of the same three "special issues" held to violate this defendant's constitutional rights in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), inconsistent with *Penry I* and other relevant constitutional rights in relevant decisions of this court?
>
> (2) May a psychiatrist appointed by the court on motion of defense counsel whose report is used as evidence for the prosecution be an "agent of the state" for purposes of the Fifth Amendment holding of

should likewise be granted here to resolve the admittedly important and recurring *Pearce* question presented in this case.

CONCLUSION

For these reasons, and those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Of Counsel:
PATRICK J. BERRIGAN
WATSON & DAMERON
2500 Holmes Road
Kansas City, MO 64108
(816) 474-3350

GREGORY A. CASTANIAS
(*Counsel of Record*)
ELIZABETH REES
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

September 10, 2002

Estelle v. Smith, 451 U.S. 454 (1981)?

Petitioner's Brief, 2001 WL 237371 (Jan. 11, 2001).